University of Alberta

Will the *Charter* burn down the Longhouse?: How the *Charter of Rights and Freedoms* may affect a separate criminal justice system based upon Mohawk traditions.

by

David Leo Milward

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the

requirements for the degree of Masters of Law

Faculty of Law

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "Will the *Charter* Burn Down the Longhouse?: How the *Charter of Rights and Freedoms* May Affect a Separate Criminal Justice System Based Upon Mohawk Traditions." submitted by David Leo Milward in partial fulfillment of the requirements for the degree of Master of Laws.

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ABSTRACT

A common aspiration among Aboriginal peoples is the creation of separate criminal justice systems based upon Aboriginal traditions. Aboriginal people may have a right to separate justice systems under the *Constitution Act, 1982*. An important issue is how the *Charter* would affect these systems. Some commentators oppose the application of the *Charter*, saying that it would adversely affect efforts to preserve traditional culture and other collective goals. Others maintain that Aboriginal individuals must still have their rights against Aboriginal governments. How would this conflict be resolved?

This thesis argues that the Supreme Court would try to accommodate both Aboriginal ideals of justice, and individual rights under the *Charter*. However, the Court may end up favouring *Charter* rights over Aboriginal rights when they come into sharp conflict. Aboriginal practices may be accommodated only when acceptable within *Charter* terms. This thesis then offers suggestions on how Aboriginal perspectives could be better accommodated.

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Chapter 1: Introduction

An aspiration that exists among some Aboriginal peoples is to obtain greater control over criminal justice within their communities. The term "separate justice" is often used for such aspirations. Though the aspirations may be common in Aboriginal circles, the perspectives on what separate justice means are variegated. Two Aboriginal scholars for example, Patricia Monture-Okanee and Mary Ellen Turpel, have proposed complete autonomy and jurisdiction over criminal justice for Aboriginal communities:

> Especially insofar as criminal justice institutions reach *within* our communities, the criminal justice system can only work if premised on the notion that Aboriginal peoples are different and separate. Therefore, Aboriginal people must be allowed to design and control the criminal justice system inside their communities in accordance with the particular Aboriginal history, language and social and cultural practices of that community. The justice system in Aboriginal communities will, of necessity, be different than elsewhere (namely in non-Aboriginal society) in Canada. It will not be a lesser system and it will not be Canadian law - it will be our system and our law.[1]

The Aboriginal Justice Inquiry of Manitoba recommended the creation of separate Aboriginal justice systems. What is meant by "separate justice" though is Aboriginal communities having a greater degree of control over the administration of justice. The Criminal Code, and its substantive offences, still applies.[2] An excerpt from the inquiry reads:

> Aboriginal justice systems should be established in Aboriginal communities, beginning with the establishment of Aboriginal courts... We suggest that Aboriginal courts assume jurisdiction on a gradual basis, starting with summary conviction criminal cases, small claims and child welfare matters. Ultimately, there is no reason why Aboriginal courts and their justice systems cannot assume full jurisdiction over all matters at their own pace.[3]

The Royal Commission on Aboriginal Peoples has endorsed self-government for Aboriginal peoples. In attempting to delineate what jurisdictions self-government would enjoy in relation

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1 P.A. Monture-Okanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) U.B.C.L. Rev. (Special Edition) 239 at 257.

2 R.S.C. 1985, c. C - 46.

3 A.C. Hamilton and C.M. Sinclair, *Summary, Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1 (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) at 642.

to the federal government and the provinces, the Commission included criminal justice within core jurisdictions that should be allocated to Aboriginal governments[4]. On the other hand, the Commission also endorses the idea that the federal government could intrude upon those core jurisdictions under limited circumstances[5]. As such, the Commission's support of the aspiration cannot be construed as the complete autonomy envisioned by Monture-Okanee and Turpel.

At least three justifications could be advanced for Aboriginal communities having greater control over criminal justice. The first is that the Canadian criminal justice system has failed to provide justice to Aboriginal peoples. Statistics of over-incarceration of Aboriginal people form a large part of that criticism. The following is an excerpt from *Locking Up Natives in Canada*, a report released by the Canadian Bar Association:

> Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Government figures which reflect different definitions of "native" and which probably underestimate the number of prisoners who consider themselves native show that almost 10% of the federal penitentiary population is native (including about 13% of the federal women's prisoner population) compared to about 2% of the population nationally.[6]

Carol LaPrairie offers more recent statistics:

> There is virtually no over-representation of Aboriginal people in provincial correctional institutions

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4 Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol. 2, part 1, ch. 3 "Governance" (Ottawa: Royal Commission on Aboriginal Peoples, 1993). The Commission recognizes an inherent Aboriginal right to self-government under the Canadian constitution at 213-214, then includes jurisdiction over criminal law and procedure within this right at 217-218.

5 Under *R. v. Sparrow*, [1990] 1 S.C.R. 1075, governments can infringe Aboriginal rights if a test of justification is met. The test has various components. Does the infringement uphold the honour of the Crown in its dealings with Aboriginal peoples? Is the infringement a minimal impairment of the right? Has there been adequate consultation of the Aboriginal peoples? Is there sufficient compensation in situations of expropriation? (at 1119) R.C.A.P. is clear that the core jurisdictions may be intruded upon if it can be done with sufficient justification. See Royal Commission on Aboriginal Peoples, *Partners in Confederation* (Ottawa: Minister of Supply and Services Canada, 1991) at 36-37.

6 Canadian Bar Association, *Locking up Natives in Canada: A Report of the Canadian Bar Association Committee on Imprisonment and Release* (Ottawa: Canadian Bar Association, 1988) at 3.

> in Prince Edward Island and Quebec, but over-representation in Nova Scotia and New Brunswick is 1/5 to two times higher than would be expected given the size of their respective provincial Aboriginal populations. In B.C., this disproportionality is 5 times, in Alberta 9 times, in Saskatchewan 10 times, in Ontario 9 times, and, in Manitoba, it is seven times higher than expected.
> ...
> An examination of change over time reveals that Aboriginal over-representation within the federal prison population has grown from 11% in 1991/92 to 17% in 1998/99, and the increase has occurred primarily in the Prairie provinces.[7]

In this respect, Aboriginal control over criminal justice may be seen as a remedial measure. The Report of the Standing Committee on Justice and the Solicitor General, released under the title *Taking Responsibility*, although not advocating separate systems, made this recommendation: "... that governments develop a greater number of programs offering alternatives to imprisonment to Native offenders - these programs should be run where possible for Native people by Native people."[8] Monture-Okanee and Turpel also have this to say:

> Aboriginal peoples have "access" to the criminal justice system which is all too generous. Our representation in the offender populations has been outrageously high. We have serious reservations regarding whether, in the context of our experience to date, the criminal justice system can even be termed a "justice system" for Aboriginal peoples... Aboriginal people do not need further access to the system which exists. What is needed is meaningful participation in the criminal justice system and less "access". By meaningful participation we suggest that Aboriginal people must be encouraged to participate in the system by defining the meaning, institutions and standards of justice in their own communities. [9]

A second justification is that the Canadian justice system is culturally inappropriate where Aboriginal people are concerned. A problem lies in the fact that Aboriginal traditions emphasize a process designed to achieve a consensus, and to restore harmony and health in

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[7] Carol LaPrairie, "Aboriginal over-representation in the criminal justice system: a tale of nine cities" (2002) 44 Can. J. Crim. 181 at 186-187.

[8] Canada, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Correction*, (Ottawa: House of Commons,1988) at 212.

[9] *Supra* note1 at 249.

the community. Features of the adversarial system, for example confrontational processes such as cross-examination, and an emphasis on protecting an accused's rights against the power of the state, can be incompatible with Aboriginal processes. Richard Gosse has written:

> From the Aboriginal perspective, the Canadian "administration of justice system" is foreign... The philosophies, values and approaches of the Aboriginal Peoples differ fundamentally from those of Canadian society generally in coping with "antisocial" behavior and conflict resolution.
>
> The Aboriginal Peoples do not believe in a confrontational guilt determination process, but in a holistic approach where emphasis is placed upon repairing the damage caused by antisocial behavior. To them, it is not only the justice system that is alien, it is also the law that the system is applying [10]

The Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee made an especially strong statement:

> While this report addresses the justice system it is but a flash point where the two cultures come in poignant conflict. The Euro-Canadian justice system espouses alien values and imposes irrelevant structures on First Nations communities... The clash of two cultures has been exacerbated by the attempts of the Euro-Canadian justice system to adjust the problems faced by the First Nations people. It lacks legitimacy in their eyes.[11]

While not advocating completely separate justice systems, Leonard Mandamin has argued that Canada's adversarial justice system may be inappropriate for Aboriginal persons who come from a traditional background. The solution that he proposed was to maintain the Criminal Code offences, but infuse Aboriginal consensus-based processes into the existing justice system.[12]

A third justification has a basis in Canadian law itself. Section 35(1) of the

---

10 Richard Gosse, "Charting the Course for Aboriginal Justice Reform Through Aboriginal Self-Government" in Richard Gosse, James Youngblood Henderson, and Roger Carter (ed.), *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994). See also Turpel, *supra* note 1 at 257-258.

11 Alan Grant *et al.*, *Report of the Osnaburgh-Windigo Tribal Council Justice Review Committee* (Toronto: Government of Ontario, 1990) at 6.

12 Leonard Mandamin *et al.*, "The *Criminal Code* and Aboriginal People" (1992) U.B.C.L. Rev. (Special Edition) at 15-18.

Constitution Act, 1982 reads: "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." Some see this provision as recognition that Aboriginal peoples have an inherent and now constitutional right to self-government.[13] Likewise, there are those who see greater Aboriginal control over criminal justice as an integral component of this right. Patrick Macklem states:

> In my view, the combined effect of ss. 35(1) and 25 of the *Constitution Act, 1982* is to authorize and very possibly require legislative reform of the criminal justice system to enable Aboriginal peoples to assume more responsibility for the administration of justice in Aboriginal communities across the country.[14]

Peter Hogg and Mary Ellen Turpel wrote:

> An Aboriginal government will require the power to enforce its own laws, and may wish to enforce those federal and provincial (or territorial) laws that continue to apply on Aboriginal land. The Aboriginal people will want policing, prosecutions, courts and corrections to operate so as to ensure a peaceful and law-abiding Aboriginal community. The people will also want all aspects of the justice system to be administered with sensitivity to Aboriginal ways and Aboriginal problems.[15]

The previous discussions are not intended as an exhaustive list of the possible justifications for separate Aboriginal criminal justice systems. It is also not contended that they are immune to criticism. For example, Jonathan Rudin, Dan Russell, and Stephen Coughlan have pointed out that separate systems are not necessarily a solution to the problem of over-incarceration of Aboriginals. Socioeconomic disparity and other factors not having

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13 For a few examples, see Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382., Kent McNeil "Envisaging constitutional space for Aboriginal governments" (1993) 19 Queen's L.J. 95, John J. Borrows "Constitutional Law from a First nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C.L. Rev. 1 and in "With or Without You: First Nations Law" (1996) 41 McGill L.J. 629.

14 Patrick Macklem, "Aboriginal Peoples, Criminal Justice Initiatives, and the Constitution" (1992) U.B.C.L. Rev. (Special Edition) at 280. See also Matthias R.J. Leonardy, *First Nations Criminal Jurisdiction in Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 1998).

15 Peter Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1997) 74 Can. Bar Rev. 187 at 205.

to do with the justice system itself are also behind the problem.[16] In this respect though, there is something to be said for the idea that if the problem affects Aboriginal people gravely, it is only proper to allow them greater participation in solving that problem. Blaine Favel has this to say:

> Why is it important for First Nations to have jurisdiction over justice and to assert this right? First Nations governments here in Saskatchewan and across Canada are coming to terms with the effects of colonialism. They are beginning to heal the wounds inflicted by this process. We've endured many problems within our communities for the past hundred years. In the delivery of justice, one of the things many communities are now striving toward is to have the community take responsibility for wrongs done within the community.[17]

It is not the point of this thesis however, to engage in an extensive debate about whether separate Aboriginal justice systems can be justified culturally, historically, politically, or sociologically. These justifications are presented as background.

The point of this thesis is to consider an issue which will inevitably become of great importance if separate Aboriginal justice systems become reality. Having provided some examples of what "separate justice" means to different people, a simple definition of the term is provided which will be used for the remainder of this thesis. Separate justice means the right of an Aboriginal community, by virtue of the Aboriginal rights provision in s. 35 of the *Constitution Act, 1982*, to jurisdiction over both substantive and procedural criminal justice[18].

The issue is how the *Charter of Rights and Freedoms*[19] may affect Aboriginal criminal justice systems. Aboriginal leaders must surely be alive to the possibility that

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16 Jonathan Rudin and Dan Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Mississauga, Ontario: Ontario Native Council on Justice, 1993) at 38-39, Stephen G. Coughlan, "Separate Aboriginal Justice Systems: Some Whats and Whys" (1993) 42 U.N.B.L.J. 259 at 260-261.

17 Blain Favel, "First Nations Perspective" in *Continuing Poundmaker and Riel's Quest*, *supra* note 10 at 138.

18 *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11. Substantive criminal jurisdiction means the right to decide what is a criminal offence and what is not.

19 *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *Ibid.*

individual Aboriginal persons may assert their constitutional rights against those separate systems. Will the Canadian judiciary impose constitutional constraints upon Aboriginal systems?

There are those who oppose the application of the *Charter* to Aboriginal governments, largely on grounds that it will have an adverse impact upon Aboriginal culture. Turpel's opinion was that challenges based upon individual rights could harm the efforts of Aboriginal communities to preserve their cultures, as well as other collective goals (though she was not specific as to what those may be)[20]. Rudin and Russell expressed similar concerns, with specific reference to criminal justice:

> The difficulty with allowing *Charter* challenges against alternative dispute resolution systems is that, at their core, these challenges represent philosophical disagreements between members of the community. The person initiating the *Charter* challenge is seeking to have the community's justice system conform to fit the prevailing Canadian norms of causality and criminality. The success of the individual's *Charter* claim would lead to the destruction of the collective attempt to create an alternative system that responds to the needs of the community as a whole.[21]

Patrick Macklem considered it likely that the legal rights of sections 7 to 14 could altogether erode Aboriginal approaches to justice, and even went so far as to call it legal assimilation disguised as constitutional interpretation.[22]

Conversely, it is certainly conceivable that Aboriginal governments could abuse their power at the expense of their own people. Roger Gibbins supports the application of the *Charter* to Aboriginal governments. He stresses that Aboriginal individuals may be especially vulnerable in their communities without the protection of the *Charter*:

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20 Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges" 10 Canadian Woman Studies 151 at 153.

21 *Supra* note 16 at 51.

22 *Supra* note 14 at 289.

> The *Charter* takes on additional importance when we realize that individual rights and freedoms are likely to come under greater threat from Indian governments than they are from other governments in Canada. This is not because Indians are particularly insensitive toward individual rights, although the desire to protect collective rights could well encourage such insensitivity. The threat to individual right and freedoms comes from the size and homogeneity of Indian communities rather than from their "Indianness" per se. Indian communities tend to be small and characterized by extensive family and kinship ties, and it is in just such communities that individual rights and freedoms are most vulnerable.[23]

On the one hand, there is the aspiration of some Aboriginal communities to run their own criminal justice systems according to their traditions. This aspiration may be a constitutionally protected right under s. 35.[24] On the other hand, there are the rights of the individual, enforceable against state power in criminal proceedings. Quite possibly a great deal of tension exists between the two sets of rights. How is this tension to be resolved? Is one to be clearly favoured over the other? Why? Is there a balance to be struck between the two? If so, where should it be struck? Why?

This thesis will examine how the *Charter* may end up applying to a separate Aboriginal justice system. To explore how the judiciary would handle these issues may prove useful if for no other reason than to alert everyone that judicial treatment may yield results which are unsatisfactory for all concerned - Aboriginal people, federal and provincial governments alike. Some methodological approaches upon which this examination will proceed are described below.

First, the paper will for the most part limit itself to consideration of Supreme Court doctrine in assessing what effects the *Charter* could have on a separate Aboriginal criminal justice system. The Supreme Court is after all the final arbiter of constitutional issues in

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23 Roger Gibbins, "Citizenship, Political, and Intergovernmental Problems with Indian Self-Government" in J. Rick Ponting (ed.) *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart Limited, 1986) at 374-375.

24 Again, as R.C.A.P. is quick to point out, this may be subject to the Sparrow standard of justification. *Partners in Confederation*, *supra* note 5 at 36-37.

Canada. The rest of the judiciary is compelled to follow suit. Supreme Court decisions on constitutional rights, unless the legislative override provision in s. 33 of the *Charter* is used, become the final word until that Court alters its course.

Second, the paper will limit itself to consideration of the rights found in ss. 7 to 14 of the *Charter*. Certainly, criminal law may violate rights found in other sections of the *Charter* besides these. *R. v. Keegstra* is a famous example of how criminal law can infringe upon the freedom of expression under s. 2(b) of the *Charter*[25]. But sections 7 to 14 have the most influence on the criminal justice system. Section 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The principles of fundamental justice are considered to provide many of the philosophical underpinnings of the criminal justice system. Justice Lamer (as he then was), had this to say about s. 7 in the context of criminal law: "... the principles of fundamental justice are to be found in the basic tenets of our legal system."[26] Sections 8 to 14 are specific examples of fundamental justice in the context of criminal justice.

Third, this thesis will use the Iroquois as an example of how the *Charter* could impact upon a separate Aboriginal justice system. In modern times, the Mohawk community of Akwesasne has seen efforts to revive traditional laws and methods of resolving disputes in the form of *The Code of Offences and Procedures of Justice for the Mohawk Nation at*

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25 [1990] 3 S.C.R. 697.

26 *Reference re Section 94(2) of the Motor Vehicle Act. B.C.*, [1985] 2 S.C.R. 486 at 503.

Akwesasne.[27] Efforts to have this *Code* adopted by the elected council have been unsuccessful so far. Even so, there is every reason to believe that traditionalists in Mohawk communities, Akwesasne included, continue to practice their own brand of justice "behind the scenes." For these reasons, the Iroquois, with emphasis on Akwesasne, seem to provide fertile ground for exploration.

Lastly, a theory of how the Supreme Court in practice decides issues of constitutional law will be constructed. This theory will hereinafter be called the "Preferred Result Approach." The theory is that the Court's approach is essentially result oriented. Past decisions and commentary from the Court provide insights as to those results it prefers, and those it does not. If precedent and the text of a provision leave the Court with enough room to decide in favour of that result, it will do so. It is this approach that will provide a basis for predicting how the Court may apply the *Charter* to a Mohawk justice system. The construction of this preferred result approach is the subject of Chapter 2.

Chapter 3 examines a Mohawk claim to a right to a separate system under the existing law on Aboriginal rights. An application of the preferred result approach suggests three possible scenarios. One scenario is that the Court has been and will continue to be unsympathetic towards a generous treatment of Aboriginal rights to self-government. Claims to traditional practices involving crime and justice will be subjected to a rigorous application of strict legal tests which still exist in the law on Aboriginal rights. Another scenario is that the application of those strict legal tests will allow for some recognition of Aboriginal rights,

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27 *Code of Offences and Procedures of Justice for the Mohawk Nation at Akwesasne*, draft #10. The draft was provided by Martha LaFrance of the Akwesasne Justice Department.

but on very narrow terms. The last scenario suggests a future willingness to deal with self-government more generously. This scenario is based upon an *obiter dictum* in *Delgamuukw v. British Columbia.*[28] A result of the last scenario may be a broader recognition of rights to criminal justice practices. The second scenario suggests that there may be some recognition of Aboriginal rights, albeit in very narrow terms. The third scenario suggests more generous recognition of Aboriginal rights. As such, it is reasonable to proceed with the rest of the thesis on the assumption that the Mohawks' constitutional rights to criminal justice practices are established.

Chapter 4 considers whether the *Charter* applies to Aboriginal governments. There are two provisions in the *Charter*, ss. 25 and 32, which may altogether prevent *Charter* review of Aboriginal governments. An application of the preferred result approach leads to the conclusion that maintaining the uniform application of the *Charter* to all people living within Canada is of considerable importance to the Supreme Court. As such, they may adopt a more restrictive interpretation of ss. 25 and 32 in order to subject Aboriginal justice systems to the *Charter*.

Chapter 5 is the application of the preferred result approach to Mohawk practices of criminal justice. Six particular contexts will be examined: search and seizure, the presumption of innocence, the contrast between adversarial process and Aboriginal non-adversarial processes, the right to counsel, the right to silence, and exclusion of evidence. Since conflicts of constitutional rights are involved, the approach established in *Dagenais vs.*

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[28] [1997] 3 S.C.R. 1010.

Canadian Broadcasting Corporation applies.[29] *Dagenais* mandates balancing constitutional rights when they come into conflict, trying to accommodate both rights as much as possible. The Supreme Court may try to make an effort to somehow accommodate both Aboriginal rights and legal rights. Yet it is an unescapable fact that Aboriginal ideals of justice and the principles of fundamental justice, the philosophical underpinnings of the legal rights in ss. 7 to 14, can come into sharp conflict. The preferred result approach suggests that in the event of such seemingly irreconcilable conflicts, the Supreme Court would inevitably end up favouring legal rights over Aboriginal rights. The Court has often displayed a lack of sympathy for Aboriginal rights, frequently allowing non-constitutional interests to prevail over those rights. In contrast, the Court has often demonstrated a very generous treatment of legal rights. It is very difficult to justify a limitation of some legal rights, the right to a fair trial being one example. As such, the Court's inclination may be to accommodate Aboriginal ideals of justice only to the point that they are consistent with recognized exceptions to the principles of fundamental justice under s. 7.

In the conclusion, a model is proposed for resolving the conflict between the individual rights of the *Charter* and an Aboriginal right to a separate criminal justice system. Some have suggested that the *Charter* should apply in full force to Aboriginal communities. Others have said that the *Charter* should have no application whatsoever to Aboriginal communities. What is proposed is a compromise approach. Resolving disputes according to Aboriginal traditions is a worthy goal, one that should not be eroded altogether by the influence of the *Charter*. On the other hand, there is the potential for abuse of power in

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[29] [1994] 3 S.C.R. 835.

Aboriginal communities. Some degree of *Charter* protection may be a "necessary evil." The model differs from the Supreme Court's approach by suggesting that some constitutional doctrines can and should be modified so that they are more appropriate for Aboriginal justice systems.

Chapter 2: The Preferred Result Approach

This thesis is concerned with issues of applying the *Charter* to justice systems based upon Aboriginal traditions.[30] Those Aboriginal traditions may themselves be protected as constitutional rights under s. 35 of the *Constitution Act, 1982*. As such, the thesis is concerned with how conflicts between these two sets of constitutional rights may be resolved. Since this involves the interpretation of constitutional rights, a methodology for understanding how the Supreme Court interprets the *Constitution Act. 1982* is developed in this chapter. Its premise is that the Court's approach is result oriented, as opposed to being strictly bound by precedent.

Before the preferred results approach is explained, this chapter will provide some background by looking at a variety of theories on constitutional interpretation. Most of those theories concern themselves with the Court's treatment of s. 1 of the *Charter*, which reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In *R. v. Oakes*, the Supreme Court set out a series of tests for determining whether infringements upon *Charter* rights are justified under s. 1. Chief Justice Dickson states:

> First, the objective which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom".. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified... There are in my view, three

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30 *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

> important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[31]

The proportionality test has since been modified in *Dagenais*. The deleterious effects are now balanced against not only the legislative objective, but also against the salutary effects of the impugned law.[32] It is the Court's subsequent application of these tests which has provided grist for the mills of the theorists. It is beyond the scope of this thesis to provide a comprehensive review of those theories. What is presented are some examples, so that the reader obtains some appreciation for a variety of viewpoints.

2.1 Examples of Constitutional Theory

2.1.1 Constitutional Law is the Objective Application of the Law Itself

Under s.24 (1) of the *Charter*, a court of competent jurisdiction can grant a remedy for violation of a *Charter* right. Under s.52, a court can amend or even strike down legislation inconsistent with the constitution of Canada.[33] The legal mandate of the judiciary to enforce *Charter* rights against government bodies in Canada is beyond question.

Yet this has created an ongoing political controversy. Canada had previously been a Parliamentary democracy. Parliament and the provincial legislatures, so long as they were acting within their proper jurisdiction, had the final word. With the *Charter*, the judiciary can now amend or even strike down laws passed by Parliament or provincial legislatures if they

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31 [1986] 1 S.C.R. 103 at 138-139.

32 *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at 889.

33 This includes not only legislation that violates *Charter* rights, but also legislation that is *ultra vires* a legislative body, and legislation that violates any other document with constitutional status.

are inconsistent with *Charter* rights. The controversy is whether judicial review under the *Charter* in effect elevates the judiciary to a "super-legislature" that is not elected and therefore less accountable. This adds to the ongoing debate among Canada's academic lawyers concerning the legitimacy of judicial review in Canada.

From the start the Supreme Court has asserted the legitimacy of its function under the *Charter* on the basis that its proper function is to objectively apply the law to the facts when deciding issues of constitutional law. Decisions must be based upon established constitutional doctrine, and the text of the *Charter*'s provisions. Ideally, subjective decisions based on a judge's own opinions on what is the best policy are to be avoided. In *Law Society of Upper Canada v. Skapinker*, the first case decided under the *Charter*, Justice Estey declared:

> At the outset, let it be emphasized in the clearest possible language that the issue before this Court in this appeal is not whether it is or is not in the interest of this community to require Canadian citizenship as a precondition to membership in the bar. Rather, the only issue is whether s.28(c) of the *Law Society Act*, is inconsistent with s.6(2)(b) of the *Canadian Charter of Rights and Freedoms*.[34]

In the *Motor Vehicle Reference*, Justice Lamer (as he then was) had this to say in reference to s. 7 of the *Charter*:

> The task of the Court is not to choose between substantive or procedural content per se but to secure for persons "the full benefit of the *Charter's* protection"... under s.7, while avoiding adjudication of the merits of public policy. This can only be accomplished by a purposive analysis and the articulation... of "objective and manageable standards" for the operation of the section within such a framework.[35]

Integral to the Court's justification of its authority under the *Charter* is the judicial

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[34] [1984] 1 S.C.R. 357 at 359-360.

[35] *Reference re Section 94(2) of the Motor Vehicle Act, B.C.*, [1985] 2 S.C.R. 486 at 499.

convention of *stare decisis*.[36] *Stare decisis* operates in every field in which judicial decisions operate to create principles of law. The basic tenet of *stare decisis* is that like cases must be decided in a like manner. Decisions of the past **should** determine the outcome of a present decision. A theory behind *stare decisis* is that it prevents the judicial process from becoming an arbitrary and whimsical exercise, whose outcomes depend solely upon the individual judge within an individual case. By obliging (or persuading) judges to look to precedents for guidance, the legal principles upon which decisions are made take on the qualities of certainty, predictability, and clarity. This in turn means that judicial decisions themselves have the quality and character of being law in the truest sense of the word. From Justice Cartwright, we have this comment:

> I do not doubt the power of this Court to depart from a previous decision of its own but, where the earlier decision has not been made *per incuriam* and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons.[37]

In *R. v. Salituro*, Justice Iacobucci reiterated that there are significant constraints upon the power of the judiciary to change the law.[38] The Supreme Court considers itself bound by *stare decisis* in constitutional matters, absent compelling circumstances. Indeed, it was likely at the forefront of the minds of Justice Estey and Justice Lamer when they made their comments in *Skapinker* and *Motor Vehicle Reference*.[39] *Stare decisis* itself can cast

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36 William F. Ehrcke, "Stare Decisis" (1995) 53 The Advocate, part 6, 847 at 847-850, explains that there is some debate as to whether *stare decisis* is a binding rule of law, or merely a convention which, while not obligatory, is nonetheless of great importance for judges brought up in common law traditions. See also H. Patrick Glenn, "The Common Law in Canada" (1995) 74 Can. Bar Rev. 261 at 262-263.

37 *Binus v. The Queen*, [1967] S.C.R. 594 at 601.

38 [1991] 3 S.C.R. 654 at 670.

39 *Supra* notes 34 and 35.

constitutional decision making as the objective application of law, provided that it is observed in practice in constitutional decisions. Whether that is the case though, is a matter of some debate within academic circles.

2.1.2 Constitutional Adjudication is Subjective

Despite the Supreme Court's expressed mandate, the overwhelming tenor of Canadian academic commentary has been to say that adjudication under the *Charter* has not been the objective application of legal doctrine, but subjective choices based on a judge's own values and beliefs under the rubric of legal doctrine. David Fraser wrote:

> I start first with the premise that every act of interpretation is a political act. The meaning which we, as members of a particular interpretive community, give to a text, is determined by a vast array of historical and social factors. The meaning which that text carries with it after our interpretation and the effect it has, are imbued with dramatic political potential.[40]

Within this large stream are of course many variants.

Some of them are quite scathing. For example, David Beatty views the Court's treatment of *Charter* rights as guided by political ideology. At the time of his writing in 1991, eight out of the nine justices were appointed by Brian Mulroney. In his opinion, those justices tended towards a blind, uncritical, and conservative pursuit of deference towards legislation. He concluded that such behavior could render the *Charter* a barren document.[41] Roy Romanow commented on the hope that the *Charter* would be a vehicle for social progress:

> The life experience of most judges naturally enables them to better understand the interests of the economic and political status quo, and the privileged groups in positions of leadership in that system.

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[40] David Fraser, *And Now For Something Completely Different: Judging Interpretation and the Canadian Charter of Rights and Freedoms*, (A paper delivered at the Conference of the Canadian Society for Hermeneutics and Post Modern Thought, Winnipeg, May, 1986). [unpublished].

[41] David Beatty, "A Concservative's Court: the Politicization of Law" (1991) U.T.L.J. 147.

> Try as they might, judges do not often succeed in distancing themselves from their backgrounds. Consequently, the kind of decisions we have been looking at have tended to reflect the views of the powerful, and to discount the interests of the common person, and the interests of any government which is attempting to create a society in which every individual is equal in reality, not just in theory.[42]

Andrew Lokan also questions the idea that *Charter* litigation is the objective application of law. His criticism is that having been confronted by many difficult issues, the Supreme Court has produced so many constitutional doctrines, and so many twists, shades of meaning, and glosses within those doctrines that at the end of it what is left cannot be called doctrine. What is left is an entirely *ad hoc* approach to rendering decisions, albeit couched in terms of legal principle.[43] Two examples can be used here to illustrate his contention. *Irwin Toy v. Quebec (A.G.)* saw the introduction of a distinction between laws that protect a vulnerable group (like children) which merit greater deference to a legislature, and laws which pit the accused against the state as a singular antagonist.[44] Lokan is quick to point out that constitutional cases involving criminal law can involve aspects of both scenarios. In *R. v. Keegstra*, the Court upheld s. 319 of the Criminal Code[45], which makes it an offence to make public communications that incite hatred against an identifiable group. The majority justified this by stressing the need to protect groups, such as religious or ethnic minorities, from the potentially harmful effects of hate propaganda.[46] In *R. v. Seaboyer; R. v. Gayme*, the Supreme Court struck down s. 276.1 of the Criminal Code, which generally

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42 Roy Romanow, "And Justice for Whom?" (1986) 16 Manitoba L.J. 102 at 107.

43 Andrew Lokan, "The Rise and Fall of Doctrine Under Section 1 of the *Charter*" (1992) 24 Ottawa L.R. 163.

44 [1989] 1S.C.R. 927.

45 R.S.C. 1985, c., C - 46.

46 [1991] 3 S.C.R. 697.

prohibited an accused from adducing evidence of the complainant's past sexual history in sexual offence proceedings. The majority decided that it was a violation of the right to full answer and defence under s.7 of the *Charter* which could not be justified under s.1.[47] In one case, the Court decides in favour of upholding legislation which protects a vulnerable group. In another case, the Court strikes down legislation to enforce the rights of an accused against the state. In Lokan's view, where such in-between cases occur, the distinction leaves the court free to do as it pleases and what is left cannot honestly be called doctrine.[48]

Another example he provides is what is called the "contextual" approach, whereby *Charter* rights mean something in one context and something else in another. The case he refers to is *Edmonton Journal v. Alberta (A.G.)*, which contains a comment that the freedom of expression in s. 2(b) of the *Charter* would have greater importance in the context of political discourse than it would in the context of disclosure during a matrimonial dispute.[49] According to Lokan, such an approach encourages the Court to come up with an infinite variety of contexts and thereby erode the presence of true doctrine in constitutional decision making.[50] After *Irwin Toy*, the protection of a vulnerable group is one context for constitutional justification, while pitting the accused against the state as a singular antagonist is another context. Cases such as *R. v. Wholesale Travel Group Inc.*[51] and *Thomson Newspapers Ltd. vs. Canada (Director of Investigation and Research Restriction Trades*

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47 [1991] 2 S.C.R. 577.

48 *Supra* note 43 at 183.

49 [1989] 2 S.C.R. 1326 at 1355-56.

50 *Supra* note 43 at 184.

51 [1991] 3 S.C.R. 154.

Practices Commission)[52] create yet another distinction. Offences are easier to justify when they are in the regulatory offence context, as opposed to a true criminal law context. Lokan argues that when all of these distinctions are lumped together, the picture becomes very complicated.[53]

As persuasive as these theories may sound, it could be said with equal vigor that constitutional doctrine also contains hard and fast rules. For example, the right to counsel could be said to contain many specific rules. The police must abstain from interrogating the accused until he has had an opportunity to consult with counsel[54]. If the accused appears to have second thoughts about exercising his right to counsel, the police must then inform him of his rights again.[55] Informing an accused of his right to counsel must also include information about the availability of duty counsel, legal aid (if it exists in the accused's jurisdiction), and 24-hour free "duty counsel."[56] It could be said that in this field, precedent governs.

A moderate, and perhaps more realistic, observation is that the very nature of constitutional interpretation is such that it cannot help but possess an element of the political or the subjective. Timothy Christian argues that by requiring an assessment of what is demonstrably justifiable in a free and democratic society, s. 1 of the *Charter* unavoidably demands an assessment of those political arguments which would justify violations of

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52 [1990] 1 S.C.R. 425.

53 *Supra* note 43 at 187-188.

54 *R. v. Manninen*, [1987] 1 S.C.R. 1233 and *R. v. Ross*, [1989] 1 S.C.R. 3.

55 *R. v. Prosper*, [1994] 3 S.C.R. 236.

56 *R. v. Brydges*, [1990] 1 S.C.R. 190 and *R. v. Bartle*, [1994] 3 S.C.R. 173.

Charter rights. The role of the judiciary therefore becomes overtly political.[57] Marc Gold argues that constitutional cases involve the presentation into evidence of materials which go beyond strictly legal considerations (e.g., social science evidence).[58] If judges have to consider such materials, it necessarily obliges them to call upon their own experiences, values, and prejudices. According to Gold, the reason for this is that to evaluate such material, a judge must draw upon his accumulated knowledge, some of which is tacit.[59] In questioning the legalistic justification of *Charter* review, Joel C. Bakan wrote:

> The difficulty with this type of argument is that most of the provisions of the constitutional text are couched in language so general as to allow for multiple plausible meanings. A definition of a concept like "liberty," "equality," "freedom of expression," or "property and civil rights" may attract unanimous assent when articulated at a high level of abstraction, but this unanimity quickly fractures as the concept is defined in more and more particular terms. While in theory judges must be constrained by the concepts prescribed by the constitution in reaching their decisions, constraint is problematic in practice because of the indeterminacy of constitutional language.[60]

Beverly MacLachlin, now the Chief Justice of the Supreme Court, has admitted that confining constitutional adjudication to strictly legal reasoning is at best a difficult pursuit. She states:

> To make matters more difficult, the *Charter* has deprived judges of their traditional methods of answering the questions that are put before them. Rules of construction, stare decisis and the doctrine of precedent are of limited value when one is not only confronted by new issues, but required to make fundamental value choices in deciding them.[61]

Some academics concede that subjectivity may be unavoidable in constitutional interpretation, and legitimate judicial review in other ways. For example, Patrick Monahan

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57 Timothy J. Christian, "The Limited Operation of the Limitations Clause" (1987) 25 Alta. L. Rev. 264 at 277.

58 The same could be said of non-constitutional cases. However, the use of non-legal materials is perhaps more frequent for constitutional cases.

59 Marc Gold, "The Rhetoric of Rights: The Supreme Court and the Charter" (1987) 25 Osgoode Hall L.J. 375 at 383.

60 Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123 at 125.

61 Beverly MacLachlin, "The Charter of Rights and Freedoms: A Judicial Perspective" (1989) 23 U.B.C.L. Rev. 581.

declares that a neat separation between law and politics is impossible to attain. In his model, judicial review should be confined to process-based claims to rights, while abstaining from substantive claims to rights, which are properly left to legislatures.[62] Rights of assembly, debate, and free election would be examples of process-based rights that judges could adjudicate. The policies or end results of those processes would be substantive matters better left to legislative bodies.[63] Joel C. Bakan points out an obvious flaw with such a distinction. Can the right to equality be characterized as either strictly substantive or strictly procedural? Should it be relegated to the sphere of substantive for the sake of maintaining Monahan's distinction? Surely such a notion would offend those who believe that equality must receive constitutional protection.[64]

Andrew Petter and Allan Hutchinson describe two other legitimizing theories:

> While there are as many jurisprudential theories as there are theorists, two general themes emerge from the literature defending the legitimacy of constitutionally entrenched rights. One line of argument suggests that such rights reflect some transcendent set of norms or values, rooted in Nature, God or some lesser philosophical deity. According to this naturalist vision, the role of the courts is simply to identify and give interpretive effect to these high norms and values. Another school of thought proceeds from the assumption that such rights reflect the shared values and aspirations of the community from which they arise. According to the positivist perspective, the role of the courts is confined to locating these values and applying them to litigated cases.[65]

They are also just as quick to identify a flaw with such theories. In a society as large and variegated as Canada, can you ever hope to find any kind of consensus on a transcendent or shared set of values to be embodied in a constitution?

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62 Patrick Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C.L. Rev. 87.

63 *Ibid.* at 146.

64 Joel C. Bakan, "Strange Expectations: A Review of Two Theories of Judicial Review" (1990) 35 McGill L.J. 439.

65 Andrew Petter and Allan Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989) 23 U.B.C.L. Rev. 531 at 534.

Also noteworthy are Ronald Dworkin's theories, described in the following terms by Peter Halewood:

> Dworkin defended the view that legal "interpretation"... locates a meaning which is neither "just there", announcing itself objectively from the constitutional text, nor "invented", subjectively reflecting a judge's personal moral opinions. Judicial or constitutional meaning is neither "text-bound", contained in the text..., nor is it unconstrained, text-independent. Legal interpretation is substantive but not arbitrary; it is constrained by the internal and institutional structure of law.
>
> ... This works in the following way. All interpretations of legal text are theory-dependent, linked to aesthetic or political theories "all the way down." But despite this theory-dependancy, which is not objectively constrained by a textual meaning, such interpretation is not mere judicial invention because our interpretive convictions (and conventions) act as checks upon one another.[66]

In stark contrast to some of their peers, Leon Trakman and others have actually criticized the Supreme Court for not paying sufficient attention to the normative aspects of *Charter* law. In their view, the Court has reduced the *Oakes* test to a sterile and mechanical exercise. What they call for is a greater effort to discern the values behind the impugned legislation, the values of the *Charter* right being infringed, then comparing them, in an assessment under the *Oakes* test.[67] Though this is an effort at maintaining objectivity in constitutional matters, it becomes doubtful when they try to provide an example of how their approach could be applied. In applying it to the freedom of expression, they end up making judgement calls such as political and artistic expression being more important than commercial advertising for example.[68] By making such value judgements, this effort at objectivity seems to slide into those same political assessments which Timothy Christian has described.

At the other end of the spectrum from Trakman is the theory of interpretivism, which

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66 Peter Halewood, "Performance and Pragmatism in Constitutional Interpretation" (1990) Can. J. L. & Jur. 91 at 99

67 Leon E. Trakman, William Cole-Hamilton and Sean Gatien, "R. v. Oakes 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83. In fact, they develop a several step method for this normative approach.

68 *Ibid.* at 122-132.

has its own approach to removing a particular judge's viewpoints or preferences as a factor in constitutional adjudication. A constitution should be interpreted only with reference to the text of the constitution. Two American exponents of interpretivism, Robert Bork and Raoul Berger, have also gone so far as to say that a constitution is frozen at the time of its adoption. A constitution and its text are to be given the meaning it held for those who framed it at the time of its adoption.[69] In a sense, the Supreme Court could be said to have taken a similar approach with reference to Aboriginal rights. As will be seen, some of the Court's principles place heavy emphasis upon identifying whether Aboriginal practices existed before contact with Europeans. It seems to freeze Aboriginal rights in a manner analogous to what interpretivism envisions.

Some of the literature has also articulated the theory that if subjectivity or politics is present in constitutional interpretation, then legal doctrine and even the text of the provision can become subordinate to the value judgements of judges. Stated another way, doctrine and constitutional text can be manipulated by judges to bring about a desired result. Lokan argues that the tests of justification in *Oakes* are of such generality and vagueness as to be highly manipulable. The end result is that judges have little to go on besides their own instincts and prejudices.[70]

Bakan makes this comment on the "pressing and substantial objective" component of the *Oakes* test:

> Furthermore, the way the Court characterizes the purpose of a legislative provision will tilt the

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69 R.H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990). R. Berger, *Government by Judiciary* (Massachusetts: Harvard University Press, 1971).

70 *Supra* note 43 at 187.

> argument about means/ends proportionality in one direction or the other. The tightness of the fit between means and ends will inevitably depend on the level of generality at which the purpose is defined. If the purpose is tautologically equivalent to the legislative provision, then there will be an absolute fit - no other provision would be capable of achieving the purpose. On the other hand, if the purpose is defined in general and abstract terms, while the legislative provision is very specific, the fit will appear much looser. None of this would be a problem if there were some determinate source for identifying the purpose of a given legislative provision. The difficulty, however, is that the characterization of the purpose of a legislative provision is itself a discretionary exercise. The Court might refer to any number of sources in support of a particular characterization - legislative records, counsel for the government, pre-legislative reports, the preamble to the Act, a construction of the whole Act or a particular part of it, et cetera. Within and among each of these it will be possible to find support for a multiplicity of characterizations of legislative objective. And there is no source for determining which of these is uniquely correct.[71]

In constitutional cases, it is common for the participants, the Justices included, to come up with different conclusions on what the legislative objective is. For one example, s. 16(4) of the *Criminal Code* requires that a defence based upon mental disorder be proved on the balance of probabilities. In *R. v. Chaulk*, the section was challenged on the basis that it violated the right to be presumed innocent until proven guilty beyond a reasonable doubt under s.11(d) of the *Charter*.[72] The Attorney Generals of Manitoba and Ontario argued that the legislative objective was to avoid the stigmatization and punishment of those who truly suffer from a mental disorder.[73] The Court concluded that the objective was to relieve the Crown of the onerous burden of having to disprove mental disorder beyond a reasonable doubt in every single case.[74]

Sydney R. Peck argues that every single test in the *Oakes* doctrine is indeterminate, subject to manipulation, and therefore a recipe for result-oriented decision making. His particularly sharp comment on the "deleterious effects" test in *Oakes* is quoted here:

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71 *Supra* note 60 at 166.

72 [1990] 3 S.C.R. 1303 at 1313.

73 *Ibid.* at 1336.

74 *Ibid.* at 1339.

> ... the justices of the Supreme Court may refine the effects to provide that a provision limits a right or freedom only if it has a substantial effect on the right or freedom. If the doctrine develops in this way, the determination whether an effect is substantial or not will be another point in the analysis at which judges may disagree. In the absence of clear rules to determine what is a substantial effect, judges may engage in result-oriented decision making by manipulating the doctrine to justify choices determined not by the doctrine but by their policy preferences and their views about the desirability of judicial activism or restraint.[75]

2.2 The Preferred Result Approach

The above examples of constitutional theory provide a context for understanding how the Supreme Court might apply the *Charter* to Aboriginal criminal justice systems, with the Iroquois as a specific example. Important to this attempt at prediction is an understanding that constitutional adjudication in the Supreme Court is both subjective and results oriented. This means that the key to predicting how the Supreme Court will apply the *Charter* to separate Aboriginal systems is to identify preferred results in particular instances. Precedent is useful in this regard in that it can help reveal which concepts or results have received sympathetic treatment from the Court, and which have not.

It is common in the context of Aboriginal rights law for the Court to explicitly articulate its preferred result. For example, in *R. v. Sparrow* the Court announced that s. 35(1) provided a solid constitutional base upon which Aboriginal groups could pursue negotiations.[76] In *Delgamuukw v. British Columbia*, the Court admonished to both governments and Aboriginal peoples the desirability of negotiations as the avenue to decide the issues. They even went so far as say that the Crown is under a moral, if not legal, duty to pursue negotiations in good faith.[77]

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75 Sydney R. Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 Osgoode Hall L.J. 1 at 37.

76 [1990] 1 S.C.R. 1075 at 1105.

77 [1997] 3 S.C.R. 1010 at 1123-1124.

The preferred result may represent a Justice's sincere belief as to what is consistent with the purpose of the *Constitution Act, 1982*. However, problems may emerge when there are difficulties fitting a preferred result neatly into existing precedent or constitutional text. According to the preferred result approach, precedent and even the text of a provision are not "set in stone" constraints upon the Court. If the Court has room to maneuver towards a preferred result, it will do so. Take for example the concept of *sui generis*, a concept of Aboriginal rights enunciated even before the passing of the *Constitution Act, 1982*. Its basic premise is that Aboriginal rights are unique, so much so that their jurisprudential treatment is not necessarily to be restricted by conventional legal rules.[78] A specific example is that while treaties are analogous to contracts between two parties, the rules of treaty interpretation are not necessarily to be restricted by the conventional rules of contract law.[79] By its very terms, an emphasis on **uniqueness**, the concept of *sui generis* can conceivably provide a court immeasurable latitude in its adjudication of Aboriginal rights.[80]

2.3 Three Case Studies

In *Charter* jurisprudence, s. 1 provides similar latitude. To illustrate this point, two *Charter* cases will be examined. The first case is *R. v. Butler*,[81] It is an example of the Court electing to characterize the legislative objective a certain way to uphold an anti-pornography

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78 The use of the term "*sui generis*" to describe Indian rights at law occurred first in *R. v. Simon*, [1985] 2 S.C.R. 387 at 404, and *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 365. It was incorporated into Aboriginal constitutional rights under s. 35 in *Sparrow*, *supra* note 76 at 1112.

79 *R. v. Marshall*, [1999] 3 S.C.R. 456. Treaties are a unique type of agreement that attract special principles of interpretation (at 511). Technical or contractual interpretation of treaties is to be avoided (at 512).

80 For a similar argument, see John Borrows and Leonard I. Rotman "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (Dec. 1997) 36 Alta. L. Rev. 9.

81 [1992] 1 S.C.R. 452.

law in the *Criminal Code*. That law could have been characterized in a different, and equally plausible, way resulting in the law being struck down. In *R. v. Downey*,[82] the majority treats the rational connection test in *Oakes* in a manner inconsistent with precedent. The reason for this was that the Court wanted to preserve an evidentiary presumption that made it easier to prove the offence of living off the avails of prostitution, which members of the Court clearly saw as a serious social ill. A third case demonstrating the "preferred result approach" is *R. v. Jobidon*[83]. While not a constitutional law case, it is an example of where the Court had no conventional legal means to maneuver towards its preferred result, and still decided in favour of that preferred result anyway. The Criminal Code permits the use of common law interpretations only when it provides a defence or benefit to the accused. In *Jobidon*, the Court used a common law principle which denied a defence to the accused.

2.3.1 R. v. Butler

In this case, the offence of distributing obscene material under s.163 of the *Criminal Code* was challenged as an infringement upon the freedom of expression. Section 163 reads in part:

> 163(1) Every one commits an offence who,
>
> (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or ...
>
> (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

In the background of this case was another constitutional decision, *R. v. Big M Drug*

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82 [1992] 2 S.C.R. 10.

83 [1991] 2 S.C.R. 714.

Mart Ltd.[84]. In *Big M Drug Mart*, the *Lord's Day Act* was challenged as an infringement on the freedom of religion because it prohibited conducting business employing of workers on Sunday.[85] On the issue of legislative objective, two different characterizations were advanced by the opposing parties. Counsel for Big M Drug Mart characterized the law as enforcing observance of the Christian Sabbath. The Attorney General of Canada characterized the law as having the secular purpose of providing everyone with a day of rest from work.[86] Chief Justice Dickson accepted Big M's argument: "A finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country."[87] The Attorney General argued that the Court should only consider the effects of the legislation, not its purpose, in deciding constitutional validity. Chief Justice Dickson rejected this argument:

> I cannot agree. In my view, both the purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve...
>
> Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the *Charter*. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of *Charter* rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.[88]

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84 [1985] 1 S.C.R. 295.

85 *Ibid.* at 301-302. *Lord's Day Act*. R.S.C. 1970, c. L - 13.

86 *Ibid.* at 316.

87 *Ibid.* at 331.

88 *Ibid.* at 331-332.

The Attorney General also argued that while at the time of its enactment, the *Lord's Day Act* had the religious purpose of compelling observance of the Christian Sabbath, it could now be characterized as having the secular purpose of providing a uniform day of rest. Chief Justice Dickson also rejected this argument, and articulated what came to be known as the "shifting purpose doctrine": "Furthermore, the theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of 'Parliamentary intention.' Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."[89] Chief Justice Dickson remarked that the religious purpose of the *Lord's Day Act* would not be viewed sympathetically for purposes of whether the Act was constitutionally justified:

> To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.[90]

He went on to strike down the law on the basis that the religious purpose of compelling observance of the Christian Sabbath rendered it unnecessary to decide whether the law was justified under s.1.[91]

In *Butler* the accused argued that the purpose of s. 163, which makes the distribution of sexually obscene material a criminal offence, was to enforce sexual morality. Justice

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89 *Ibid.* at 335.

90 *Ibid.* at 337

91 *Ibid.* at 354.

Sopinka, for a unanimous court, rejected this argument and characterized the law as having the purpose of protecting women (and sometimes men) from the potentially harmful effects of the distribution of obscene material.[92]

Justice Sopinka pointed to a number of factors in support of his conclusion. Previous versions of the obscenity law emphasized the morality or immorality of the material[93]. Common law interpretation of s.163 before the *Charter* had taken on a different tenor. Section 163(8) brought in "objective standards" to measure obscenity.[94] The courts developed a "community standard of tolerance" test. The emphasis in this test is not so much what members of the community cannot tolerate viewing for themselves, but what they cannot tolerate being exposed to the community at large.[95] Since s.163 was enacted, government committees also commented on the need to protect women, and to prevent harmful effects from the distribution of obscene material.[96] However, the fact remains that s.163 was enacted in 1959. Did Parliament introduce the law with the purpose of preventing harm, as opposed to the imposition of sexual morality? A plausible answer could be no. Perhaps s.163(8) could be thought of as providing indicators of sexual morality.

In *Butler*, Justice Sopinka described what he felt was at stake in the case:

> The Courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means

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92 *Supra* note 81 at 493.

93 The statute contained the word 'obscenity' without anything more specific. In the background was the English authority, *R. v. Hicklin* (1868), L.R. 3 Q.B. 360, which defined "obscene material" as material capable of corrupting the minds and morals of its recipient.

94 *Supra* note 81 at 474-475.

95 *Ibid.* at 476-478. The latest authority on this test was *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494.

96 *Supra* note 81 at 479.

> that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning.[97]

Evidently, the preferred result was not to leave a legislative vacuum when it came to dealing with the type of harm described by Justice Sopinka J. He conceded that if the Court accepted Butler's characterization of the law as enforcing sexual morality, it would have been struck down:

> To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract... The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.[98]

Yet he characterized the law, enacted in 1959, as having the purpose of preventing harmful effects from distribution of obscene material. This case is one of legislative interpretation. Nevertheless, it does raise questions of how consistently the Court is applying the shifting purpose doctrine. Lokan saw it as a violation of the doctrine.[99] Violating the shifting purpose doctrine allowed the Court to uphold s.163, retaining the criminal offence of distributing sexually obscene material. The distribution of such material was perceived by the Court as a serious social problem that had to be addressed.

2.3.2 R. v. Downey

In this case, the accused was charged with living off the avails of another person's prostitution, contrary to s. 212(1)(j) of the *Criminal Code*. At issue was s.212(3), which provides that evidence that a person is habitually in the company of a prostitute is proof of

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97 *Ibid.* at 452.

98 *Ibid.* at 492-493.

99 *Supra* note 43 at 187.

living off the avails of prostitution, in the absence of evidence to the contrary. This presumption was challenged as a violation of the right to be presumed innocent under s.11(d) of the *Charter*.[100] The Supreme Court agreed, on the basis that it created the possibility of conviction despite the existence of a reasonable doubt.[101]

Recall that one of the tests in *Oakes* is that there must be a rational connection between the legislative objective and the means chosen to pursue that objective. In *Downey*, the Court's application of the rational connection test to the presumption in s.212(3) was contentious. Justice Cory applied the rational connection test as follows:

> In order to be valid the measures taken must be carefully designed to respond to the objective. Yet the proportionality test can and must vary with the circumstances. Parliament is limited in the options which it has at hand to meet or address the problem. Rigid and inflexible standards should not be imposed on legislators attempting to resolve a difficult and intransigent problem. Here, Parliament has sought, by the presumption, to focus on those circumstances in which maintaining close ties to prostitutes gives rise to a reasonable inference of living on the avails of prostitutes. This is not an unreasonable inference for Parliament to legislatively presume, as it cannot be denied that there is often a connection between maintaining close ties to prostitutes and living on the avails of prostitution.[102]

Compare this to application of the rational connection test in *Oakes* to a presumption that if the accused was in possession of a narcotic, it was for the purpose of trafficking (from Chief Justice Dickson):

> ... is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous convictions for drug trafficking of persons guilty only of possession of narcotics.
>
> In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent

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100 Under s. 11(d), "Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by and independent and impartial tribunal.

101 *Downey*, *supra* note 82 at 34.

102 *Ibid.* at 36-37.

to traffic on the basis of his or her possession of a very small quantity of narcotics.[103]

If a person is in possession of a narcotic, it does not necessarily follow that it was with intent to traffic it. Could it be said that if a person is habitually in the company of a prostitute, it does not necessarily follow that the person is living off the avails of prostitution? Justice Cory commented that there is often a connection between the proven fact of habitually being in the company of a prostitute and the presumed fact of living off the avails of prostitution. Does "often", meaning true in some cases but not in others, pass muster under the rational connection test as described in *Oakes*? The answer is probably no. In justifying his conclusion, Justice Cory also emphasizes the lack of alternatives for Parliament. Under the original *Oakes* test, would it not have been more appropriate though to refer to lack of alternatives in the minimal impairment test, as opposed to the rational connection test? Recall that in *Oakes*, the Court dealt with the availability of less intrusive means in the minimal impairment test, but not the rational connection test.[104]

Justice McLachlin wrote a vigorous dissent, in which she attacked Justice Cory's treatment of the rational connection test.

> ... *Oakes* suggests that s. 1 requires a very high degree of internal rational connection between the substituted and presumed facts. *The fact that the existence of the presumed fact would be a rational inference in some cases is not enough* - the connection between the substituted and presumed facts must be more certain than that in order to pass constitutional muster. (Emphasis added)[105]

Her understanding of the rational connection test was that "proof of the substituted fact must

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103 *Oakes*, *supra* note 31 at 142.

104 *Ibid.* at 141-142.

105 *Downey*, *supra* note 82 at 42.

make it likely that the presumed fact is true."[106] In other words, a person habitually in the company of a prostitute is often a pimp is a lower (and therefore unacceptable) threshold than that the person is likely her pimp. Commenting on *Downey*, David Tanovich is likewise critical: "By focusing more on the external rather than the internal rationality of the presumption and in establishing such a low test of internal rationality, Cory J. fails to appreciate that s. 212(3) is irrational, illogical and unfair and can lead to unjustified and erroneous convictions."[107]

Justice Cory's preferred result is not hard to discern. It is to maintain the legislative presumption which makes it easier for the system to prosecute pimps. He describes the necessity of prosecuting pimps with almost religious prose. In his words, "From a review of Committee reports and the current literature pertaining to the problem, it is obvious that the section is attempting to deal with a cruel and pervasive social evil. The pimp personifies abusive and exploitative malevolence."[108] Justice Cory also recognized that there were practical difficulties involved with prosecuting pimps, because: "Whether pimps maintain control by the emotional dependence of prostitutes upon them or by physical violence, prostitutes have exhibited a marked reluctance to testify against their pimps"[109]. Justice Cory further justified his conclusion by commenting on the lack of available alternatives for Parliament, a consideration that was properly confined to minimal impairment instead of

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106 *Ibid.* at 43.

107 David Tanovich, "The Unravelling of the Golden Thread: The Supreme Court's Compromise of the Presumption of Innocence" (1993) 35 Criminal L.Q. 194 at 204.

108 *Supra* note 82 at 36.

109 *Ibid.* at 34.

rational connection. Perhaps this represents a doctrinal shift. In any event, the preferred result in *Downey* could not have issued without changing existing doctrine. The rational connection test as articulated in *Oakes* does not allow it.

2.3.3 R. v. Jobidon

On September 19th, 1986, Jules Jobidon beat Rodney Haggart to death in a fist fight which the two had engaged in voluntarily. Jobidon was charged with manslaughter. His defence was that Haggart had consented, which under the *Criminal Code* is a defence to the underlying unlawful act of assault.[110] The Supreme Court however, denied this defence, by reading into the *Criminal Code* offence the common law restriction that one cannot consent to bodily harm.[111]

The *Criminal Code* imposes some statutory restrictions upon consent. One example is that consent cannot be obtained by fraud (s. 265(3)(c)) . The occurrence of serious bodily harm is not one of those restrictions. However, the Court read the common law restriction on consent to harm into the law of assault on the basis of s. 8 of the *Criminal Code,* which reads in part:

> 8(2) The criminal law of England that was in force in a province immediately before April 1, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.
>
> (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament, except in so far as they are altered by or are inconsistent with this Act or Parliament.

In *R. v. Kirzner*, the Supreme Court commented that s. 8 (then s. 7) did not prevent

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110 Assault and consent are defined in s.265 of the *Criminal Code*. Homicide by an unlawful act is established in 222(5)(a).

111 *Jobidon, supra* note 83 at 739-745.

the Court from recognizing new common law defences in addition to those that existed when the *Criminal Code* was first enacted.[112] In light of this statement, it is a sound conclusion that the Court of 1977 understood the provision as allowing at most common law defences and justifications. What *Jobidon* represents is a common law expansion of the basis for criminal liability for assault by restricting the availability of a defence to the detriment of the accused.

The preferred result in *Jobidon* reflects public policy against allowing bodily harm to occur in mutually agreed to fights. However, to decide such a result was clearly against the established interpretation of s. 8 of the *Criminal Code*.

2.4 Precedent not Followed, Other Examples

Other examples demonstrate the Supreme Court sometimes may not make a genuine effort to hold itself to *stare decisis*. For example, in *Kindler v. Canada (Minister of Justice)*, a majority of the Court decided that extradition to a death penalty jurisdiction for a capital crime without assurances that the death penalty would not be imposed did not necessarily violate s. 7 of the *Charter*.[113] Only under circumstances where the extradition would "shock the conscience" would a violation of s.7 be found. A specific example provided by the Court was extradition where torture or capital punishment would be the certain result. The possibility of the death penalty did not necessarily meet the "shock the conscience"test.[114]

Ten years later, the Court decided in *United States of America v. Burns* that extradition to a death penalty jurisdiction for a capital crime without assurances that the

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112 [1978] 2 S.C.R. 487 at 496.

113 [1991] 1 S.C.R. 779 at 854.

114 *Ibid.* at 849.

death penalty would not be imposed does violate s. 7. Under this authority, the death penalty, with its grave and irreversible consequences for life, liberty, and security of the person, would almost invariably meet the "shock the conscience" test.[115]

In support of overturning *Kindler*, the Court raised (among other things) the issue of wrongful conviction. It cited several examples of wrongful conviction from Canada's own history, including Donald Marshall, David Milgaard, and Guy Paul Morin.[116] This could readily be deemed compelling circumstances under which to overturn a precedent. Yet the Court in *Kindler* must surely also have been aware of these same three notorious wrongful convictions. This is a fact Richard Haigh is quick to point out when he hints that the reason for overturning *Kindler* may simply have been that the composition of the Supreme Court has since changed.[117] An irreverent observation perhaps, but relevant in questioning how much of a hold precedent has on the Court in constitutional matters.

The cases on Aboriginal rights and s.35 of the *Constitution Act, 1982* will be examined in more detail in Chapter 3. Nonetheless, a brief description of them underscores the point about the flexibility of *stare decisis* in constitutional interpretation. In *R. v. Sparrow*, the Court heralded what promised to be a broad and generous recognition of Aboriginal rights. The test was whether a right claimed was integral to the Aboriginal group making the claim. *Sparrow* also mandated a generous and liberal interpretation of Aboriginal rights that takes into account the perspective of the Aboriginal peoples

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115 [2001] 1 S.C.R. 283 at 324-326.

116 *Ibid.* at 537-541.

117 Richard Haig, "A *Kindler*, Gentler Supreme Court? The Case of *Burns* and the need for a Principled Appraoch to Overruling" (2001) 14 Sup. Ct. L. Rev. (2d) 139 at 139-140 and 153-154.

themselves.[118] Six years later in *R. v. Van der Peet*, the Court articulated a very stringent series of tests that limited Aboriginal rights to practices that were integral to claimant groups before contact with Europeans. There must also be continuity between pre-contact practice and modern day practice.[119] Also, Aboriginal rights must be articulated in specific as opposed to general terms.[120] In *Delgamuukw* v. *British Columbia*, the Court retreated and articulated a more generous test for the recognition of Aboriginal rights, insofar as land title is concerned.[121]

Similarly in the area of rights associated with self-government, we see the same instability with which the term *stare decisis* could not be associated. *R. v. Pamajewon* insisted that claims to rights of self-government must pass the strict *Van der Peet* tests.[122] In other words, there is no general right to self-government. Rights can only be claimed as individual and specific practices according to the *Van der Peet* tests. In *Delgamuukw*, we find an *obiter dictum* that the Court in the future may be willing to consider self-government in greater depth. It hints that litigants in the future could draw upon the reports of the Royal Commission on Aboriginal Peoples and other materials to frame legal arguments in support of self-government in the future.[123] Recall that the Royal Commission recognized that Aboriginal governments may have rights to jurisdiction in core areas such as criminal justice,

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118 *Supra* note 76 at 1106.

119 [1996] 2 S.C.R. 507 at 559.

120 *Ibid.* at 553.

121 *Supra* note 77 at 1097-1106.

122 *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at 826-832.

123 *Supra* note 77 at 1115.

although those rights may be justifiably infringed. *Delgamuukw*'s allusion to a document that refers to core jurisdictions may mean a potentially broader recognition of self-government rights than what is allowed under *Pamajewon*.

To be fair, Aboriginal rights is an extremely difficult area for the Court because it involves the collision of so many different interests[124]. Yet, considering that the Court often changes it mind a mere few years after the previous decision, it would be a dubious conclusion that strict adherence to precedent governs the sphere of Aboriginal rights. Nonetheless, there are arguments that can be made against the preferred result approach, which must now be dealt with.

2.5 Arguments Against the Preferred Result Approach

One argument that can be made against the preferred result approach is that there are some areas of constitutional law where precedent seems to reign. Take for example the right to counsel in s. 10(b) of the *Charter,* where it can be said that there exist hard and set rules and precedents. Does this refute the approach that constitutional decision making is results oriented? No.

According to David M. Tanovich, the right to counsel occupies a unique place in Canadian jurisprudence. In a legal system that depends almost entirely upon advocacy by counsel, the right to counsel is the mechanism by which the other legal rights in the justice system are enforced[125]. As such, it can be argued that the rules on right to counsel reflect a

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124 Some of those collisions can be very direct. Take for example, *R. v. Marshall, supra* note 79, which involved a treaty right to fish for and sell eels commercially. Hostilities between the Micmac claimants and non-Aboriginal fisherman often escalated into violent confrontations. For a description of them, see Theresa Snow, "In the Eye of a Storm" (Dec 1999) 24:3 Law Now 7.

125 David M. Tanovich, "Charting the Constitutional Right of Effective Assistance of Counsel in Canada" (Aug. 1994) 36 Criminal L.Q. 404.

clear policy on the part of the court that emphasizes generous protection of the right, keeping an accused as informed as possible of his rights (including information on Legal Aid and the availability of duty counsel), and requiring a maximum of care from state authorities. Once the court has articulated a series of rules that reinforce its clear preferred result, it creates an environment in which precedent will truly determine outcomes.

Another argument can be made based upon Dworkin's theories, which were discussed earlier in this chapter. According to Dworkin, constitutional interpretation is neither completely objective nor completely arbitrary. It does involve making substantive choices, and thus is not completely constrained by the text of a provision or precedent. Yet it is still constrained to some degree by the internal and institutional structure of law, and by interpretive conventions. Stated another way, constitutional interpretation is confined to a core of reasonableness. A counter-argument can be made that even within Dworkin's theories, there is scope for result-oriented decision making. Within the core of reasonableness, there exists more than one possibility in a given case. One possibility in this core can become a preferred result, and is then chosen over the other reasonable possibilities.

Another argument that can be made is to ask how anyone can truly predict what the Supreme Court is going to do. In the examples provided in this chapter, discerning the preferred result was easy because it was after the fact. Can reliable predictions be made beforehand? In *Jobidon*, nobody could foretell that s. 8 would have been used to impose a common law restriction on the availability of a defence, when the provision allows courts to use common law defences and justifications. The preferred result approach is not being touted as a foolproof method to predict an outcome. It is developed as a method to venture

educated guesses on what the Court may do in a given situation. Decisions and comments by the Court provide us with insights on how the Court views certain issues, and concepts. These insights provide a basis for making educated guesses. Two examples will be provided which will be explored in greater detail in subsequent chapters. In *R. v. Gladue*, the Court commented that where Aboriginal offenders are concerned, judges should accommodate Aboriginal perspectives during the sentencing process whenever possible. This suggests that the Court may to some degree accommodate non-adversarial processes designed by Aboriginal communities. In *Dagenais*, the Court stated that when constitutional rights come into conflict, they are to be balanced so that one is not favoured over the other. Even so, the Court circumscribed the freedom of expression, protected under s. 2(b) of the *Charter*, with reference to whether the accused's trial was kept fair.[126] This suggests that if an Aboriginal right comes into conflict with the right to a fair trial, the latter is likely to prevail.

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126 *Supra* note 32 at 877.

Chapter 3: Whether There is a Right to Traditional Justice

The previous chapter explored how precedent can be manipulated to achieve certain outcomes. The purpose of this chapter is to look at how s. 35[127] jurisprudence may be applied to Mohawk claims to rights to traditional practices concerning crime and justice.

3.1 The Rights Being Claimed

A preliminary step in establishing the s. 35 right is to consider the Iroquois system of justice, both before contact with Europeans, and as envisioned in present-day Mohawk communities. This first step is necessary because the Court will need a factual background to adjudicate a Mohawk right to a separate system.[128]

3.1.1 Iroquois Justice Before Contact

At the outset, it must be noted that written sources on how the Iroquois handled crime and justice before contact are admittedly few. These sources may also invite a fair share of scepticism. Michael Coyle issues this warning:

> Before proceeding to analyze the particular mechanisms by which social order was traditionally maintained in Iroquois, Cree, and Ojibwa communities, two warnings should be given. First, this paper speaks only of what we know about the traditional justice ways of Ontario Indians on the basis of *written* records. Usually, therefore, the historical source is non-Indian. Often the writer is someone, such as a trading post manager or a missionary, who may not have been particularly interested either in investigating the intricacies of the social organization of the Indians or in discovering that their social organization was a complex or effective one. Occasionally, on the other hand, a historical writer is biased in the opposite direction, inventing or glorifying aspects of traditional Indian society for ulterior purposes. Critical judgement of such historical testimony is especially important given the scarcity of the records available.[129]

Nonetheless, a description of Iroquois traditional justice before contact will have to be based

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127 Section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

128 The purpose here is not to cover every fact and argument necessary for the claim. The point is to set up the potential existence of the rights so that the application of legal rights in ss. 7 to 14 of the *Charter* can be discussed within a meaningful factual context.

129 Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall L.J. 605 at 613.

upon these sources for the simple reason that not much else is available. The danger of inaccuracy may not be that great in any event, since the earlier sources seem consistent with the present day descriptions provided by Doug George-Kanentiio, who is himself Iroquois.[130]

The primary unit of social organization in Iroquois society was the clan. The clan was an extended family with a shared identity, and an association with an animal totem. The nine clans of the Iroquois were the Bear, Beaver, Deer, Eel, Hawk, Heron, Snipe, Turtle, and Wolf. All nine clans existed among the Seneca, Cayuga and Onondaga nations. Only the Bear, Turtle, and Wolf clans existed among the Oneida and Mohawk nations.[131] The Iroquois were a matriarchal society. The elder women had the greatest say in the affairs of the clan.[132]

The clan was also very much a political unit. The Grand Council of the Confederacy was composed of fifty *sachems* or chiefs. The Onondaga were represented by fourteen chiefs, the Cayuga ten, the Seneca eight, and the Mohawk and Oneida nine each. The Tuscaroras were placed among the Oneida and Cayuga when they entered the Confederacy approximately 270 years ago. It is through those two nations that they were represented at the Council.[133] When a *sachem* had to be replaced, whether by death, illness, or misconduct, the women of his clan made the initial selection for a new *sachem*. In the normal course of events, the clan as a whole had to be unanimous in their selection. After that, the rest of the

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130 Douglas George-Kanentiio, *Iroquois Culture and Commentary* (Santa Fe, New Mexico: Clear Light Publishers, 2000).

131 *Ibid.* at 70-72.

132 *Ibid.* at 53-56.

133 *Ibid.* at 122. Donald S. Lutz "The Iroquois Confederation Constitution: An Analysis" (1998) Publius: The Journal of Federalism 28:2 99 at 110-112.

clans also had to provide unanimous agreement. The selection was then brought to the Grand Council for final approval, which by then was usually a formality.[134]

Matters of crime and punishment, when they were serious enough, were handled primarily by clan councils. Crime was actually very rare among the Iroquois in earlier times. The apparent reason for this was that the ethical standards of Iroquois society were so deeply ingrained in its members that deviations were almost unheard of.[135] As one example, the Jesuits had all but described the Iroquois as utopia itself:

> They are very much attached to each other, and agree admirably. You do not see any disputes, quarrels, enmities, or reproaches among them... I say, as far as we know, for we have never seen anything except always great respect and love among them: which was a great grief to us when we turned our eyes upon our own short comings.[136]

The main deterrent force against crime among the Iroquois was a severe stigma against actions which violated their standards. Arthur C. Parker writes:

> There were no houses of punishment, no police. The standard of behavior was enforced by means of ostracism and by social persecution. Anxious to fit into the scheme of things, to gain the respect and to hold the regard of his fellows, the offender mended his manners before some irate warrior slew him as an enemy of the social body.[137]

Coyle states that this strong moral cohesion among the Iroquois obviated the need for a penal code typical of the modern legal system.[138]

Yet the Iroquois did possess methods for dealing with crime beyond ostracism.

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134 *Iroquois Culture and Commentary*, *supra* note 130 at 95-97.

135 William B. Newell, *Crime and Justice Among the Iroquois Nations* (Montreal: Caughnawaga Historical Society, 1965) at 35-47.

136 Rueben Gold Thwaites (ed.), *Travels and Explorations of the Jesuit Missionaries in New France 1610-1792*, vol. 3 (Cleveland: The Burrows Brothers Co., 1897) at 3:93.

137 Arthur C. Parker, *An Analytical History of the Seneca Indians* (Rochester: New York State Archeological Association, 1926) at 65.

138 *Supra* note 129 at 616.

When a crime was considered serious enough, the typical response was the calling of a clan council to resolve the conflict.

Cases involving murder could become quite complicated. An initial step was a meeting between clan leaders to decide the question of guilt. Which clans were involved in the meeting apparently depended upon who was the victim and who was the perpetrator. Lewis Morgan saw the Iroquois clans as having been grouped together into larger divisions called moieties. Within one moiety were the Deer, Hawk, Heron, and Snipe clans. Within the other were the Bear, Beaver, Turtle and Wolf clans. If the accused was from one moiety and the victim from the other, the leaders from all of the clans would meet together to decide if the accused was guilty. If they were both from the same moiety, the clan leaders within that moiety would hold council.[139] The accused person was provided an opportunity to defend himself.[140]

If the council was satisfied that the accused was guilty, attention was then turned to the appropriate disposition or remedy. The family of the victim was responsible for obtaining satisfaction on the victim's part, so that his or her spirit could be laid to rest. The clan of the offender was generally responsible for providing that satisfaction.[141] The results could vary.

One result was the execution of the offender. The Iroquois were apparently very reluctant to use this punishment. It was considered more important to restore harmony in the

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139 Lewis Morgan, ed. by Herbert M. Lloyd, *League of the Iroquois*, vol. 1 (New York: Dodd, Mead, and Co., 1901) at 322-324. Morgan does not mention the Eel clan. As such, it is difficult to see where they would fit into this scheme. It is possible that Morgan may not have been aware of them.

140 Kanentiio, *supra* note 130 at 99.

141 *Ibid.* at 99. Morgan, *supra* note 139 at 322-324. Coyle, *supra* note 129 at 617, 620.

community.[142] In this respect, a far more typical disposition was to provide compensation to the victim's family. For one example, if the victim was a farmer and his family depended upon him for support, the offender could be required to assume the victim's role for an extended period of time.[143] Another example could happen where the victim was from one moiety and the offender from another. If the offender had confessed his crime and expressed a desire to atone, the clan leaders from the offender's moiety would offer a present of white wampum to the clan leaders of the victim's moiety. In such an instance though, this offer was a petition for forgiveness, not compensation.[144]

Another result was adoption. If the offender demonstrated genuine remorse, the victim's clan could decide to adopt the offender into their clan and have him or her serve their needs for as long as they saw fit. For the offender, this represented a complete loss of former identity, and the severance of all familial ties previously held.[145]

Another punishment was banishment of the offender. The offender was physically scarred and cut loose from the community. His scar signified him as one to be shunned by the community.[146] If the victim's family could not agree to offers of compensation, adoption, wampum presents, etc., they were within their rights to exercise what we would call "private justice." They could kill the offender with no fear of reprisal. They could even appoint another person as an avenger, someone who could not rest until he had avenged the victim.

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142 Coyle, *supra* note 129 at 620. Kanentiio, *supra* note 130 at 99-100.

143 Kanentiio, *supra* note 130 at 99-100.

144 Morgan, *supra* note 139 at 322-324.

145 Kanentiio, *supra* note 130 at 100.

146 *Ibid.* at 100. Coyle, *supra* note 129 at 620.

The offender usually fled. As with execution, the Iroquois were reluctant to resort to this, and for the same reasons.[147]

Theft was a crime. The Iroquois did not hold in high regard acquisition of personal wealth. That, coupled with a severe stigma for stealing, meant that theft was all but unheard of.[148] Nonetheless, it did occur. Compensation to the victim, from one source or another, was the typical response. Father Louis Hennepin described this as follows:

> Their old Men, who are wise and prudent, watch over the Publick. If one complains that some person has robb'd him, they carefully inform themselves who it is that committed the Theft. If they can't find him out, or if he is not able to make restitution, provided they be satisfied of the truth of the Fact, they repair the Loss, by giving some present to the injur'd Party, to his Content.[149]

It could also be punished by public flogging.[150]

Rape was an especially serious crime. According to George-Kanentiio, few actions were more offensive to Iroquois morality than to force oneself upon a woman. The punishment was the scarring of the individual and his banishment from the community.[151]

Adultery was also a crime. If the accusation was proven to the satisfaction of a clan council, the punishment was a public flogging. Only the wife was punished, who was considered the only offender.[152]Among the Tuscaroras, the traditional punishment was a shaving of the wife's head and her banishment.[153]

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147 Newell, *supra* note 135 at 57-58.

148 *Ibid.* at 67-70.

149 Father Louis Hennepin, ed. by R.G. Thwaites, *A New Discovery of a Vast Country in America* (Toronto: Coles, 1974) at 513.

150 David Cusick, *Ancient History of the Six Nations* (Lockport: Niagara Co. Historical Society, 1827) at 37.

151 Kanentiio, *supra* note 130 at 100.

152 Newell, note 135 at 71-76.

153 Cusick, *supra* note 150 at 37. Cusick was himself the son of a Tuscarora chief.

Witchcraft was apparently the most serious crime for the Iroquois. It could be used to injure or even kill another person. Its practice was seen as a threat to the community as a whole. If somebody was caught practicing witchcraft, he or she could be killed on sight. If not, the person who observed the practice could bring an accusation before the Grand Council. The witch would then be brought before the Council to face up to the accusation. If the witch made a full confession, with a promise to never do it again, a full pardon was granted. If the witch did not, then witnesses would be called to give testimony and examined regarding the facts. If the council was satisfied that the accusation was proven true, the witch was then condemned and sentenced to death. The witch was then led away to punishment by whomever volunteered to perform the execution, for which there was apparently no shortage.[154]

3.1.2 Modern Revival of Traditional Justice

In the late 1980's, traditionalists in the Mohawk community of Akwesasne constructed the *Code of Offences and Procedures of Justice for the Mohawk Nation at Akwesasne*.[155] Efforts to have the elected Mohawk tribal council adopt the code have been unsuccessful.[156] As will be seen, the code can be seen as a modern-day attempt to revive a traditional approach to criminal justice.

The code has three classifications of offences: Offences against One Another, Offences Against the Community, and Offences Against Nature. The offences are also

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154 Morgan, *supra* note 135 at 47-51.

155 *Code of Offences and Procedures of Justice for the Mohawk Nation at Akwesasne*, draft #10.

156 Kanentiio, *supra* note 130 at 107. Jonathan Rudin and Dan Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Mississauga, Ontario: Ontario Native Council on Justice, 1993) at 49.

ranked by seriousness, from minor, to serious, to grievous. It describes a number of offences including murder, assault, smuggling, vehicular offences, environmental offences, and sale or abuse of harmful substances. An analogy can be made between the punishments prescribed by the Akwesanse Code, and sanctions that had been used by the clan councils of the Iroquois before contact. Recall that when clan councils were conv ned, compensation was a common method of resolving conflicts. Banishment could also be used as a sanction. Article 6 - Section 7 of the Akwesasne Code lists a number of available punishments, including banishment, monetary fines up to $5,000, payment of twice the profit from illegal activities, probation, and community service.[157] Imprisonment as a sanction is absent from Article 6 - Section 7.

It also outlines the procedure for deciding cases. There is no trial by jury, or a right to a lawyer. The emphasis is upon mediation instead of a confrontational process over the issue of guilt. Mediation is required for minor offences (Article 6 - section 3) and strongly encouraged for serious and grievous offences (Article 6 - section 5) The code "... stresses the need for reconciliation, mediation, compromise, and consensus, ..."[158] The code would be applied by Justice Chiefs who must meet some strict requirements, some of which go to moral character (Article 6, section 10(a) & (c)). In this regard, the *Code* can be likened to the *Great Law of Peace* (the Iroquois Constitution) in that it also required the *sachems* sitting in the Grand Council to be moral and compassionate. For serious offences, all of the Justice Chiefs must reach a consensus on the question of guilt, but proof beyond a reasonable doubt

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157 Kanentiio, *supra* note 130 at 108. Rudin and Russell, *supra* note 156 at 49-50.

158 Rudin and Russell, *supra* note 156 at 49.

is not required (Article 6, sections 1(c) and 2(e)).[159]

An analogy can also be made between the procedures of the Akwesasne Code and the clan councils. The clan councils involved a meeting between the clan of the offender, and the clan of the victim. Under Article 6 - Section 5(E) of the Akwesasne Code, Justice Chiefs presiding over the trial of a serious or grievous offence ask the accuser and witnesses on his or her behalf what each would think to be a just and equitable resolution of the conflict. Under Article 6 - Section 5(H), the Justice Chiefs also ask the accused and his witnesses what each would think to be a just and equitable resolution of the conflict.

Though the *Code* was not adopted by the elected council in Akwesasne, George-Kanentiio hints that traditionalists in Mohawk communities, Akwesasne included, continue to practice their own brand of justice in secret.[160] Two systems of government exist side by side. One system is the elected chief and council, as provided for by the *Indian Act*.[161] The other system is the Longhouse Councils, which resolves disputes as and when members of the community voluntarily submit to their jurisdiction.

Rudin and Russell have documented a specific case decided by a Longhouse council, composed of members of the Mohawk nation in the community of Kahnawake. On Wednesday, February 17th, 1988, Ryan Deer, Dean Horne and a young person under 18, after drinking together, drove to a store and stole some newspapers. They used those papers to

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159 Kanentiio, *supra* note 130 at 108. Rudin and Russell, *supra* note 156 at 50.

160 *Supra* note 130 at 127-131. Though Akwessanse has an elected council under the *Indian Act*, *infra.* note 161, there is the Mohawk National Council of Chiefs. Despite no financial support or recognition from either the Canadian or American governments, it continues to claim jurisdiction over all of Akwesasne. George-Kanentiio says that the chiefs on the council continue to act as arbitrators.

161 *Indian Act*, R.S.C. 1985, c. I-5.

start two fires at abandoned buildings. When confronted by the reserve's police, the Peace Keepers, they denied their involvement. After a Quebec provincial police investigation, they were charged with arson on March 18th. Well before those charges were laid however, all three had second thoughts and confessed their guilt to the Reserve's War Chief. They asked to be judged by the Longhouse. After the Longhouse obtained the consent of the offenders, their parents, and the victims, to its jurisdiction, it convened on February 22nd.

After deliberations lasting for several days, the Longhouse found all three of them guilty of various offences on the basis of their admissions of guilt and other evidence provided. A different punishment was handed out for each offence. For stealing the newspapers, they had to apologize to the owners and pay twice the value of the newspapers. For arson, they had to apologize to the owners and pay full compensation. The damage came to $12,000. They worked for a year for the Mohawk nation in order to pay the amount back. Members of the community were to keep an eye on them, not just to make sure they were doing their work, but also to provide encouragement and support. For driving while intoxicated, they were to attend an alcohol evaluation workshop and follow any program designed by the evaluator. For lying to the Peace Keepers, they were given their first warning. Members of the community are allowed three warnings. If they lie after that, the punishment is banishment for life. The Longhouse characterized this three warning system as an ancient Iroquois tradition.[162]

The above discussion demonstrates some strong arguments to support the existence of a separate Iroquois justice system before contact, and that practices from that system are

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[162] Rudin and Russell, *supra* note 156 at 50.

still a part of life in present day Mohawk communities. There is of course some disagreement over whether traditional justice should apply to all members of the Mohawk nation. The elected council and the Longhouse councils continue to exist side by side. Efforts to have the Code adopted by the elected council have so far been unsuccessful. The reason why has not been entirely clear. A reason that could be implied is that Mohawk communities are often divided into factions. Some consider themselves modernists or progressives. Part of their agenda is the continued existence of elected councils, and for some the discontinuance of the Longhouse Councils. Then there are the traditionalists, who believe in the revival of traditional forms of governance.[163] Dickson-Gilmore raises the argument that the modernist-traditionalist dichotomy is overly simple, since even within each side there are further variations of ideology and objectives.[164] Nonetheless, he still acknowledges that a rough progressive and traditional division exists within Mohawk communities.[165] The Akwesasne council may have refused to adopt it to prevent traditional forms of governance from gaining ground. George-Kanentiio suggests that Mohawk smugglers who turn a profit from trading contraband across the Canadian and American border felt threatened by the prospect of a unified justice system and police force in all Mohawk communities. The smugglers therefore worked against adoption of the Code. However, George-Kanentiio is unclear as to who they worked with and what methods they

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163 For a detailed history, see Gerald R. Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Don Mills, Ontario: Oxford University Press Canada, 1995).

164 E. Jane Dickson-Gilmore "'This is My History, I Know Who I Am': History, Factionalist Competition, and the Assumption of Imposition in the Kahnawake Mohawk Nation" (1999) 46 Ethnohistory, no. 3, 429.

165 *Ibid.* at 434-435.

used to block the Code.[166]

It is also noteworthy that the Longhouse Council described by Rudin and Russell had to obtain the consent of the offenders, and the victims, to its jurisdiction. This may be because the victims declined to press charges to the police or withdrew them afterwards. This means that the Longhouse Council system can operate only when all sides of a dispute are willing to let their conflict be settled outside the Canadian criminal justice system. As the rejection of the Akwesasne Code makes clear, it will not happen all the time. The ideological divisions in Mohawk communities underscore the difficulty involved with resolving traditional Aboriginal rights with the individual rights regime of the *Charter*. The discussion now turns to whether traditional practices of justice may receive constitutional protection under s.35.

3.2 Aboriginal Rights Jurisprudence

Section 35 recognizes and affirms inherent Aboriginal rights and treaty rights. Canadian law maintains that rights provided by a treaty replace inherent rights. The Mohawk of Akwesasne are not party to a treaty that provides a right to a separate criminal justice system. A recent case, *Mitchell v. Canada (Minister of National Revenue)*, saw an Akwesasne chief claim a right to bring goods across the St. Lawrence seaway for trade purposes without having to pay duties.[167] When the case was heard in Federal Court, Trial Division, Mitchell tried to argue that treaties such as the Jay Treaty, the Treaty of Ghent, and

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166 Doug George-Kanentiio, "Iroquois Justice" (Spring 1995) 1:1 Akwesasne Notes 106.

167 [2001] 1 S.C.R. 911.

the Treaty of Utrecht provided that right.[168] This argument was rejected on the basis that they were treaties between European powers, not between the Mohawk and the Crown, and therefore not treaties within the meaning of s.35.[169] When the case came to the Supreme Court, the argument was dropped. The right was claimed as an inherent Aboriginal right. If the Mohawk of Akwesasne claim a right to traditional justice, the appropriate context will again be inherent Aboriginal rights. What follows is a brief review of the relevant Supreme Court jurisprudence on inherent Aboriginal rights under s.35, and an application of that jurisprudence to traditional justice practices of the Mohawk as reflected in the Akwesasne Code and the Longhouse councils.

The first Supreme Court case on s.35 was *R. v. Sparrow*.[170] Ronald Sparrow was charged with fishing with a larger net than was permitted by regulations in force in British Columbia. Sparrow argued that his Musqueam Indian band had traditionally fished for food and ceremonial purposes in the area in question. As the practice was now elevated to a constitutional right, he should be allowed to do it without the restrictions imposed by the regulations.[171]

The Court took the opportunity to expound a variety of principles concerning s. 35. Section 35 protects Aboriginal rights which were in existence when the *Constitution Act, 1982* came into effect. Contrary to arguments made by the Attorney General of B.C., the Court concluded that Aboriginal rights are not frozen in the form in which they were limited

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168 [1997] 4 C.N.L.R. 103 (Fed. T.D.) at 156-157.

169 *Ibid.* at 182-186.

170 [1990] 1 S.C.R. 1075.

171 *Ibid.* at 1088-1091.

by law when the *Constitution Act, 1982* came into force. In other words, Aboriginal rights can be revived against laws and regulations which have limited them. This includes allowing Aboriginals to exercise their rights in their "preferred manner."[172] In this case, the Court would recognize Mr. Sparrow's right to fish with a larger net than permitted by the regulations. The Court also mandated that Aboriginal rights were to be interpreted in a generous and flexible fashion, taking into account the perspective of the Aboriginal peoples themselves.[173]

The Crown may have been allowed to extinguish Aboriginal rights prior to the *Constitution Act, 1982* coming into force, but not after. For an Aboriginal right to be extinguished, "clear and plain intent" on the part of the Crown must be established. Laws inconsistent with Aboriginal rights are not by themselves sufficient to extinguish rights.[174]

Section 35 is not part of the *Charter*, but is in another part of the *Constitution Act, 1982.* The rights in s.35 are therefore not subject to s.1 of the *Charter.* Nonetheless, the Court noted that the words "recognized and affirmed" in s.35 mean that Aboriginal rights are not absolute. They are subject to justifiable limitation.[175]

The first stage of the limitation test is whether there is a *prima facie* infringement of the Aboriginal right. Chief Justice Dickson stated:

> To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders

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172 *Ibid.* at 1091-1093.

173 *Ibid.* at 1099, 1112-1113.

174 *Ibid.* at 1098-1099.

175 *Ibid.* at 1109.

of the right their preferred means of exercising that right?[176]

The next stage is deciding whether there is valid legislative objective for infringing the Aboriginal right. "The public interest" is too broad and vague to qualify as a valid objective[177]. Conservation of natural resources and preventing the exercise of Aboriginal rights in a way that would cause harm to the general population or Aboriginal people themselves were mentioned by the Court as examples of valid objectives.[178]

The next stage is whether the infringement is justified. Deciding whether an infringement is justified is influenced by *Guerin v. The Queen*.[179] In that case, the Supreme Court found that government, federal or provincial, owes fiduciary duties to Aboriginal peoples.[180] Chief Justice Dickson incorporates the notion of fiduciary obligation first introduced in *Guerin* into the *Sparrow* justification test: "... the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-a-vis Aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."[181]

He also has more to say on the test of justification:

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with

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176 *Ibid.* at 1112.

177 *Ibid.* at 1112.

178 *Ibid.* at 1113.

179 [1984] 2 S.C.R. 335.

180 In *Guerin*, the fiduciary obligation arose in the context of negotiating a lease of reserve land on behalf of the band (at 365, 375-376).

181 *Sparrow*, *supra* note 170 at 1114.

respect to the conservation measures being implemented.[182]

As previously mentioned, *Sparrow* calls for a generous interpretation of Aboriginal rights which takes into account the perspective of Aboriginal peoples themselves. Indeed, Chief Justice Dickson accepted the trial judge's finding, despite a lack of evidence, that the Musqueam band had traditionally fished in the area in question for food and ceremonial purposes.[183] He also acknowledged that Aboriginal rights protected under s. 35 are those that are integral to the distinct culture of the claimant group.[184] However, the next landmark case on inherent Aboriginal rights would change this drastically.

R. v. Van der Peet,[185] along with two other companion cases, *R. v. Gladstone*,[186] and *R. v. N.T.C. Smokehouse*,[187] saw claims to an Aboriginal right to fish for commercial purposes. It was in this trio that the Supreme Court articulated a strict series of tests governing what is protected as an Aboriginal right under s. 35.

The first stage involves how the right is to be characterized. Chief Justice Lamer wrote in *Van der Peet*: "[t]o characterize an applicant's claim correctly, a court should consider such factors as the nature of the action done pursuant to an Aboriginal right, the nature of the governmental regulation, statute or action impugned, and the tradition, custom

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182 *Ibid.* at 1119.

183 *Ibid.* at 1099.

184 *Ibid.* at 1099.

185 [1996] 2 S.C.R. 507.

186 [1996] 2 S.C.R. 723.

187 [1996] 2 S.C.R. 672.

or right relied upon to establish the right."[188] Also, the very practice itself which is claimed as a right must be phrased in specific, as opposed to general terms, and cognizable to a non-Aboriginal legal system. It would not be enough to show that Aboriginal peoples in general engaged in a practice alleged to be the historical foundation of a modern constitutional right. The Aboriginal group making a claim must show that they engaged in that practice before contact.[189] To use an example pertinent to the present discussion, a Mohawk right to a separate justice system would be unacceptable. What may instead be acceptable is claiming rights to individual practices within that separate justice system. An example includes the right to banish an individual who has lied a fourth time after three warnings.

Once the practice is properly characterized, the next test determines whether that practice merits constitutional protection as an Aboriginal right. Only practices, traditions, and customs which were integral to distinctive Aboriginal societies before contact with Europeans are protected under s.35(1).[190] It is not enough for the practice to have been significant to an Aboriginal society before contact. It had to have been "integral" to that society before contact, "it was one of the things that truly made the culture what it was."[191] Practices which developed solely in response to contact are excluded.[192] The test is a restrictive one. As such, Chief Justice Lamer took care to say this: "In assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the

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188 *Supra* note 185 at 556.

189 *Ibid.* at 559.

190 *Van der Peet*, note 185 at 549-550.

191 *Ibid.* at 553.

192 *Ibid.* at 550.

Aboriginal people claiming the right... It must also be recognized, however, that the perspective must be framed in terms cognizable to the Canadian legal and constitutional structure."[193] Chief Justice Lamer also stated that conclusive evidence of the practices would not be required in order to establish a successful claim. The evidence only needs to demonstrate which practices originated before contact.[194]

The practice need not be distinct to one particular Aboriginal society alone. The inquiry is whether it is integral to a "distinctive" as opposed to "distinct" Aboriginal society. Distinct means unique. Distinctive means "different in kind or quality; unlike."[195]

The test also requires that there be continuity between the practice before contact and the practice as it exists today. There need not be an unbroken chain of continuity. The practice may have ceased for a period of time, then resumed, without offending the requirement for continuity. The test will also permit some modification of the practice, so that it can be exercised in a contemporary manner.[196]

What is abundantly clear is that the *Van der Peet* test imposes some substantial restrictions on what can be protected as an Aboriginal right under s.35(1). In the next case, the *Van der Peet* doctrine would operate to deny a right to self-government.

In 1987, the Shawanaga First Nation had enacted a lottery law authorizing high stakes bingo and other gambling activities. High stakes gambling activity continued on the reserve without a provincial licence. Roger Jones, the chief, and Howard Pamajewon, a councillor,

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193 *Ibid.* at 550.

194 *Ibid.* at 555.

195 *Ibid.* at 560-561. Lamer C.J.C. quoted the Oxford Dictionary for the meaning of distinctive.

196 *Ibid.* at 557.

were charged with keeping a common gaming house contrary to s.201(1) of the *Criminal Code*. Members of the Eagle Lake nation who had joined the appeal argued that a licence was not needed as they and the Shawanaga nations had a broad right to manage use of reserve lands.[197]

The Supreme Court was not prepared to recognize a broad and inherent right to self-government, which they implied from the Eagle Nation members' argument. Such claims must still pass muster under the *Van der Peet* test. Chief Justice Lamer had this to say:

> To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the Aboriginal group claiming the right.[198]

Considering *Van der Peet* and *Pamajewon* together, it becomes obvious that the question cannot be framed as "Do the Iroquois have the right to a traditional justice system?". Each and every single practice that has a basis in Iroquois tradition may have to proven as meriting constitutional recognition on a case by case basis. For example, the refusal to recognize a right to counsel by an individual band member charged with intoxicated driving could spawn a case lasting years at the appellate level. The band itself could say that traditional consensus-based processes never allowed for advocates speaking on behalf of parties to a dispute. In the present, the band now enjoys a right not to allow advocates in contemporary consensus-based processes. A month later, another such case could be spawned from a denial of the right to conduct a full cross-examination.

Only by such a long and drawn out process could the parameters of the *Charter*'s application

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197 *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at 826-832. Allan Gardner, Jack Pitchenese, and Arnold Gardner were the members of the Eagle Lake nation.

198 *Ibid.* at 834.

to a traditional Iroquois system be drawn out. While the implications for Aboriginal initiatives in criminal justice are truly staggering, the present state of the law is such that there is just no way around it, short of political negotiations outside of the courtroom. Even if political negotiations produce agreements, the agreements themselves will likely be the subject of litigation that involves their interpretation.

Delgamuukw v. British Columbia[199] is a landmark case dealing with Aboriginal rights surrounding land title. It sets out a test for whether an Aboriginal group holds title to a parcel of land. All three of the following questions must be answered in the affirmative: (i) Did the Aboriginal group occupy the land prior to sovereignty? (ii) Is there continuity between present occupation and pre-sovereignty occupation? (iii) Was the Aboriginal group in exclusive occupation of the land at sovereignty?[200] If these criteria are met, then the Aboriginal group possesses a "bundle" of rights with respect to that land. Chief Justice Lamer describes the "bundle" this way:

> ... that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.[201]

Alienation of the land to a private actor, and strip mining which destroys the value of the land as a hunting ground when the Aboriginal group traditionally hunted on that land, were the examples of irreconcilable uses provided by Chief Justice Lamer.[202]

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199 [1997] 3 S.C.R. 1010.

200 *Ibid.* at 1097-1106.

201 *Ibid.* at 1083.

202 *Ibid.* at 1089.

Delgamuukw does represent a retreat from *Van der Peet*, at least where land use is concerned. In this respect, *Delgamuukw* may afford a broader recognition of traditional criminal justice practices tied to an Iroquois land base without having to pass all of the *Van der Peet* tests. The environmental offences of the Akwesasne Code come most readily to mind. In discussing proof of Aboriginal title, Chief Justice Lamer had this to say: "..., if, at the time of sovereignty, an Aboriginal society had laws in relations to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for Aboriginal title. Relevant laws might include but are not limited to, a land tenure system or laws governing tenure."[203] Though this statement involves proof of title, Aboriginal laws relating to land use can be understood as within the content of Aboriginal title. A possible point of contention is whether Mohawk people within Canada can claim occupation of their presently held lands before sovereignty.

This retreat however may or may not include claims relating to self-government or broad rights to a separate criminal justice system. Consider this *obiter dictum* from the case:

> The degree of complexity involved can be gleaned from the Report of the Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us grapple with these difficult and central issues. Without assistance from the parties it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.[204]

This comment paints at least two plausible scenarios. The first is that is that the Court simply did not deal with the issue of self-government because there was no need to. As such, claims by the Mohawk of Akwesasne to traditional practices of criminal justice will still

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203 *Ibid.* at 1100.

204 *Ibid.* at 1114-1115.

have to pass the *Van der Peet* tests. A second scenario is that the *obiter dictum* bespeaks a willingness to revisit aspects of self-government cast in more general terms if the right case with a proper evidential foundation were to come to the Court. Indeed, the Court went so far as to suggest the Royal Commission's report as a basis for legal argument in the future. This second scenario hints at a possible loosening of the strict requirements imposed by *Van der Peet* and *Pamajewon*, and towards a broader characterization of rights envisioned by the Royal Commission. Just how broad the Court is willing to go is impossible to foretell.

3.3 Whether Van der Peet Allows Akwesasne's Claims

The *obiter* in *Delgamuukw* will be left aside for the time being. The present state of the law is such that the *Van der Peet* test still governs the claims. Within each individual case, the test can be stated as, "Was the practice integral to a distinctive culture prior to contact?".

The Iroquois can easily be considered a distinctive culture. They had a refined system of government, and a codified constitution, the *Great Law of Peace*. These are features which seem to make Iroquois culture unique, distinct, over and above the requirement of distinctive.

The claims could, with sufficient effort, phrase the practices in specific as opposed to general terms, albeit on a case-by-case basis. Examples could include, "the right to prosecute witchcraft as a criminal offence", "the right to inflict corporal punishment for adultery", and "the right to banish permanently someone who lies four times."

The methods of dispute resolution practiced by the Iroquois could also be characterized as integral to their culture. A number of cases have recognized that fishing or

hunting in a specific location can be a practice integral to a distinctive culture.[205] Certainly, resolving disputes and punishing offenders according to traditional methods used by the whole community would be integral to Iroquois culture.

This and other traditional justice practices discussed earlier were probably in existence before contact with Europeans. What Morgan and others have described were practices already in place before they were there to observe them.[206] It is very unlikely that those practices developed solely in response to contact with Europeans, especially considering some of the stark differences that those practices have with European approaches to criminal justice.

One could also argue that continuity exists between Iroquois justice before contact and methods that present-day Mohawk have been trying to implement. For example, the Longhouse councils and the procedures described by the Akwesasne Code could be considered adaptations of the traditional clan councils to a contemporary setting. Compensation to the victim is also a common thread found in Iroquois justice, both past and present. The test of continuity does not demand an unbroken chain of continuity. However, it will be seen that the test of continuity may still present problems for Mohawk claims to traditional justice practices.

The Iroquois of Grand River continued to administer justice in their community in a manner that retained some basis in tradition well into the 19th century.[207] But what can be

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205 *R. v. Adams*, [1996] 3 S.C.R. 101 and *R. v. Cote*, [1996] 3 S.C.R. 139 are two examples from the Supreme Court.

206 Parker, *supra* note 137, and Morgan, *supra* note 139.

207 John A. Noon, *Law and Government of the Grand River Iroquois* (New York: Johnson Reprint Company Limited, 1949)

said of the Mohawk of Akwesasne? As far as this writer is aware, no written descriptions exist of how the Mohawk administered justice between the end of the 18th century and the late 1980's. The reason for this could be that traditional justice had to be practiced in secret to avoid detection by Canadian authorities. This may prove a weak point in any Mohawk claim to traditional justice rights. Nonetheless, it is open to the Mohawk and other Aboriginal groups to prove such claims through oral evidence. The Court has stated that due to the special nature of Aboriginal rights under s.35, oral evidence is to be given due and equal weight in comparison with other types of evidence. Even so, such evidence must not entail the complete abandonment of Canadian rules of evidence. Oral evidence must possess reliability.[208]

Even if the existence of a right is established prior to contact, it may not receive protection under s.35. The provision only protects existing Aboriginal rights. If an Aboriginal right has been extinguished, it is no longer an existing right for purposes of s. 35. There are a few possibilities with regards to extinguishing Aboriginal rights to criminal justice practices. One possibility is legislation such as the *Criminal Code* if it does so with clear and plain intent.[209] Another is that the distribution of jurisdictions between the federal and provincial governments under the *Constitution Act, 1867* leaves no room for Aboriginal jurisdiction over criminal justice.[210] Another possibility is that the *Charter* extinguished

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208 *Mitchell, supra* note 167 at 938-940. In *Mitchell*, we also have this comment at 936, "The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not 'cast in stone, nor are they enacted in a vacuum.'". The word hearsay does not appear in *Mitchell*, but this could be thought of as a principled exception to the hearsay rule. Principled exceptions require that the evidence be reliable, and that there must be a necessity to make an exception, without which the evidence would not be admitted at all. See *R. v. Smith*, [1992] 2 S.C.R. 915.

209 R.S.C. 1985, c., C - 46.

210 *Constitution Act. 1867* (U.K.), 30 & 31 Vict., c. 3. Reprinted in R.S.C. 1985, App. II, no. 5.

Aboriginal rights to criminal justice practices. Whether there is legislation that extinguishes such rights with clear and plain intent will be considered first.

It is unlikely that Canadian legislation has demonstrated a clear and plain intent to extinguish rights to traditional justice. Matthias J. Leonardy examined a number of statutes spanning Canada's history, including *The Enfranchisement Act, 1869,*[211] *The Indian Act, 1876,*[212] and the *Criminal Code, 1892.*[213] These statutes were attempts to exercise control over Aboriginal peoples, impose elected councils upon them, and extend the reach of Canadian criminal law. But none of these statutes contain explicit reference to Aboriginal customs regarding crime. An intention to extinguish Aboriginal rights to traditional justice must therefore be implied from the legislation. It is legislation that is inconsistent with Aboriginal traditional justice. In his conclusion, the legislation in question does not demonstrate a clear and plain intent to extinguish.[214]

The current *Criminal Code* could likely be placed within the same group of statutes. A contrary argument is considered by the Royal Commission. The Commission considers the possibility that the *Indian Act* extinguished rights to self-government by replacing traditional forms of tribal government with elected chiefs and council, as well as substantial limitations on the powers of those elected bodies. However, the Commission's conclusion is that this amounts to heavy regulation of the right to self-government, not a clear and plain

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211 S.C. 1869, c. 6.

212 S.C. 1876, c.34.

213 S.C. 1892, c. 29.

214 Matthias R.J. Leonardy, *First Nations Criminal Jurisdiction in Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 1998) at 181-183.

intent to extinguish those rights.[215] An analogous argument can likewise be made that the *Criminal Code* extinguishes Aboriginal rights involving crime and process since it provides a comprehensive statutory scheme for criminal process in Canada. As with the argument based on the *Indian Act*, it can also be said that the *Criminal Code* amounts to heavy regulation of Aboriginal rights involving criminal justice, but not clear and plain intent to extinguish.

Another possible argument is that the clear and plain intent test does not necessarily require explicit language referring to Aboriginal rights, though the law in question must still be more than merely inconsistent. When *Delgamuukw* was heard at the British Columbia Court of Appeal, nearly all of the judges held that extinguishment could be implied if the operation of the legislation in question could lead to no other conclusion.[216] Would the operation of the current *Criminal Code* lead to no conclusion other than extinguishment of Aboriginal rights to traditional justice? The answer is probably no. The operation of the current criminal justice system has already made considerable allowance for Aboriginal traditional processes through sentencing circles. Section 718.2(e) of the Criminal Code states that, "... all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." In interpreting this provision, the Supreme Court stated in *R. v. Gladue* that whenever possible, the sentencing process for Aboriginal

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215 Royal Commission on Aboriginal Peoples, *Partners in Confederation* (Ottawa: Minister of Supply and Services Canada, 1991), pp. 34-35. This conclusion is also reached by Dipesh Mistry, *First Nations Governance Act on First Nations' Inherent Right to Self Government* (Paper presented for Law 590: Aboriginal Peoples and the Law at the University of Alberta, 2003) [unpublished]

216 *Supra* note 199 at 1033-1060.

offenders should be crafted in accordance with the Aboriginal perspective.[217] This indicates that the Court may be unwilling to decide in favour of blanket extinguishment of all aspects of Iroquois justice.

Another approach is that a specific practice may be extinguished by a specific provision. An example of this is found in *Sawridge Indian Band v. Canada*.[218] At issue was s. 35(4) of the *Constitution Act, 1982*, which states that notwithstanding any other provision in the Act, Aboriginal and treaty rights are guaranteed equally to both Aboriginal male and female persons. The Band asserted a right to determine band membership, including the right to exclude women who lost status under the *Indian Act* by marrying a non-Indian before it was amended by Bill C-31. The Federal Court held that s. 35(4) extinguished, with clear and plain intent, traditional practices that discriminate between Aboriginal men and women.[219]

Consider ss. 468, 469 and 553 of the *Criminal Code*. Section 468 states that courts of superior jurisdiction (e.g., Court of Queen's Bench in Alberta) have jurisdiction to try any indictable offence. Section 469 states that any court of criminal jurisdiction (including provincial courts) has jurisdiction to try any indictable offence other than certain offences such as murder and treason. When s. 469 is read together with s. 468, it is clear that only courts of superior jurisdiction have jurisdiction to try offences listed in s. 469. Section 553 confers upon provincial courts absolute jurisdiction over certain offences such as theft.

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217 [1999] 1 S.C.R. 688 at 728.

218 *Sawridge Indian Band v. Canada* (T.D.) [1996] 1 F.C. 3, (F.C. Trial Div.).

219 *Ibid.* at para. 21-24.

Courts of superior jurisdiction may nonetheless try those offences as well. Sections 469 and 553 are known as the exclusive and absolute jurisdiction provisions. An argument could be made that these provisions extinguish Aboriginal rights to try murder and other offences listed in those sections. Nonetheless, these sections probably fall short of manifesting clear and plain intent to extinguish such rights. First, s. 35(4) of the *Constitution Act, 1982*, specifically mentions Aboriginal rights, and explicitly imposes a limitation on how Aboriginal rights can be exercised. Neither s. 469 nor s. 553 make any mention of Aboriginal rights. They are clearly provisions of general application throughout Canada. Second, ss. 468, 469, and 553 do not say that only those courts have jurisdiction to try certain offences. Third, it could be argued that the underlying purpose of ss. 469 and 553 is to delineate as between courts of superior jurisdiction and provincial courts which court normally has jurisdiction over which offence. Intent to extinguish is far from clear and plain.

Another possibility is that the *Constitution Act, 1867* extinguished rights of self-government, including regulation of criminal activity. Section 91(24) of the Act confers jurisdiction over criminal law and justice to the federal government. Section 92(14) confers upon the provinces jurisdiction over the administration of justice, including courts of criminal jurisdiction. When *Delgamuukw* was heard in the British Columbia Court of Appeal, the majority held that ss.91 and 92 distributed exhaustively the sphere of governance within Canada and therefore necessarily extinguished rights to self-government.[220] A possible support for this conclusion is that the preamble of the *Constitution Act, 1867*

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220 *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.).

explicitly states that any residual matter not covered by ss. 91 and 92 falls under federal jurisdiction.

The weight of opinion however is not in favour of this line of reasoning. Sections 91 and 92 are concerned with the distribution of governing powers, not their exclusivity or exhaustiveness. A historical argument that must be emphasized is that the overwhelming concern at the time Confederation was formed was to distribute spheres of jurisdiction in a manner satisfactory to both the new Parliament and the constituent provinces. It is far from obvious that extinguishing Aboriginal rights to self-government was clearly and plainly intended by the founders of Confederation. In this respect, it would be very difficult to conclude that the test of clear and plain intent has been met.[221] Dipesh Mistry also points out that the Royal Proclamation of 1763 was in force at the time Confederation was formed. Since the Royal Proclamation is seen by some as recognition that Aboriginal nations still had the right to govern themselves, it becomes even more questionable that there was a clear and plain intent to extinguish rights of governance when the *Constitution Act, 1867* was passed.[222]

Similarly, the *Constitution Act, 1982* could be seen as extinguishing rights to self-government. Section 52 of the *Act* states that the *Charter* is the supreme law of Canada. Certain sections, such as 32 and 52, could be construed as reserving governing power solely for Parliament and the provincial governments. Yet the very fact that an Aboriginal rights

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221 For more detail on these arguments, see Peter W. Hutchins, Carol Hilling, and David Schulze, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine" (1995) 29 U.B.C.L. Rev. 251, Peter Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1997) 74 Can. Bar Rev. 187, and *Partners in Confederation*, *supra* note 215 at 32.

222 Mistry, *supra* note 215.

provision was included in the *Constitution Act, 1982* renders dubious a conclusion of clear and plain intent to extinguish. Section 25, which will be considered in more detail in the next chapter, also states that *Charter* rights are not to be interpreted in a manner which derogates from Aboriginal rights. A clear and plain intent is not only far from evident, but may even be explicitly denied by the presence of both s. 35 and s.25.

3.4 Application of the Preferred Result Approach

The above discussion explored how the *Van der Peet* tests may be applied to Mohawk claims of rights to traditional practices involving crime and justice. The Mohawk could certainly make a good case for themselves under existing law, though the test of continuity remains a concern. Nonetheless the question arises whether the recognition of such rights would be a desired result for the Supreme Court. An application of the preferred results approach suggests three possible scenarios. The first scenario suggests that the Court has been and will continue to be unsympathetic towards Aboriginal aspirations for self-government, criminal justice practices included. The *Van der Peet* tests will be rigorously applied and manipulated to defeat claims to those rights. The second scenario is that at a bare minimum, the Court may be willing to recognize such rights if a considerable amount of evidence is tendered to prove their existence. In such circumstances, the Court may still be inclined to give such rights a narrow construction. The third scenario suggests a future willingness to recognize rights to self-government, and criminal justice practices, in a more generous fashion than what was seen in *Pamajewon*.

The first two scenarios are that the Court may not be sympathetic to Akwesasne's claims. They would use a strict application of *Van der Peet* to that end. Academics have

ascribed to the Court a number of motivations for their decisions in *Van der Peet* and *Delgamuukw*. W.I.C. Binnie commented that it has been relatively easy for the Court to protect a right to fish for food and ceremonial purposes because its impact on resource management was minimal. He suggested that the Court may prove hesitant to recognize a right to fish for commercial purposes because its implications for resource management policies would be far reaching.[223] His prediction may have proven true in *Van der Peet*.

In a companion case to *Van der Peet*, *R. v. Gladstone*, the Court actually recognized a right to fish for commercial purposes on the basis of expert evidence.[224] Under the *Van der Peet* test, it is possible to claim a right to fish commercially. At first blush, this may contradict Binnie's argument. Yet within that same *Gladstone* case, the Supreme Court found that the impugned regulations were a justifiable infringement upon the right as per *Sparrow*.[225] The Court even extended *Sparrow*'s valid objective test to include greater participation in the fishery by non-Aboriginal persons.[226] This development was criticized by Kent McNeil as allowing a non-constitutional interest to trump a constitutionally protected interest.[227] The Court may have been left no room to deny the right to fish commercially by the expert evidence. Yet the justifiable infringement test provided another avenue by which to bring about what may have been the preferred result. *Delgamuukw*

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223 W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning" (1990) 15 Queen's L.J. 217.

224 *Supra* note 186 at 743-747. This fits in with the second scenario, where the Court is faced with strong evidence establishing the right.

225 *Ibid.* at 779-780.

226 *Ibid.* at 775.

227 Kent McNeil, "How can the Infringements of the Constitutional Rights of Aboriginal People be Justified?" (1997) 8(2) Const. Forum 33 at 35

represents a significant retreat from *Van der Peet* in the very area of resource management. But at the time of the *Van der Peet* trilogy, the Court may have been motivated by not wanting to disrupt resource management policies that were in place. Applying Binnie's and McNeil's reasoning to Aboriginal claims to separate criminal justice systems, it could be said that the Court may prove fearful of certain consequences involved with such claims, such as the violation of civil liberties, the creation of unfair processes, or the creation of police states.

Jonathan Rudin argues that the Supreme Court was initially generous towards Aboriginal rights in *Sparrow* for the purpose of giving Aboriginal groups a sledgehammer when they entered negotiations with the federal and provincial governments. In *Sparrow*, the Court stated explicitly that s.35(1) provided Aboriginal people with a solid constitutional base with which to enter negotiations.[228] It was the Court's hope that issues involving Aboriginal rights would be resolved through negotiation. However, by the time *Van der Peet* came to the Court, not much progress had been made through negotiations. The Court was left in the very uncomfortable situation where they could render decisions that could have drastic consequences for resource management policies and other areas. In response they cringed, and retreated from treating Aboriginal rights in a generous manner.[229] In the context of criminal justice, Rudin's argument suggests that the Court may prove reluctant to unilaterally confer blanket jurisdiction on Aboriginal communities, and thereby drastically alter the state of criminal justice in Canada when Parliament has neither assented nor agreed

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[228] *Supra* note 170 at 1105.

[229] Jonathan Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics Behind the Supreme Court of Canada's Decisions in *R. v. Sparrow*, *R. v. Van der Peet* and *Delgamuukw v. British Columbia*" (1998) 13 J. of L. & Social Pol'y 67.

to such changes.

One can also see in *Pamajewon* a strong reluctance to recognize Aboriginal rights to self-government. John Borrows has this to say:

> For example, in *Jones* it would not be an unfair reading of the case to observe that the appellants were asserting an Aboriginal right to self-government. However, the Supreme Court considered that assertions of Aboriginal rights to self-government were cast at a level of "excessive generality". If s.35(1) rights encompass claims to self-government, these claims must be considered in the light of specific practices integral to pre-contact Aboriginal culture. The court's re-characterization of the right being claimed illustrates that it is not willing to consider self-government rights on any general basis. This approach defeats many Aboriginal peoples' aspiration for a fuller articulation of the powers relative to the federal and provincial governments.[230]

Borrows suggests a motive for this. Recall that *Gladstone* permitted greater access to the fishery for non-Aboriginals as a valid legislative objective for infringing Aboriginal rights. Borrows view of this is that the Court is motivated not to leave Aboriginal rights free of any inherent limitation on their exercise.[231] Aboriginal rights free of limitation could pose drastic ramifications for any subject matter of public policy, resource management, conservation policies, or otherwise. In this reasoning, the Court may not be willing to allow the unrestricted exercise of Aboriginal jurisdiction over criminal justice, without any concern for individual rights, or fair process, or police practices, and other such concerns.

Patrick Macklem and Michael Asch also suggest the court will prove reluctant to recognize these broad claims because they want to maintain the concept of Canadian sovereignty. They argue that there are two possible ways of viewing the treatment of Aboriginal rights in *Sparrow*. One is the inherent rights theory. Aboriginals have certain rights flowing from the very fact of being Aboriginal, irrespective of whether Canadian

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230 John Borrows, "Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada" (1996), 50 C.R. (4th) 230 at 235.

231 *Ibid.* at 240.

authority has recognized them. The other is the contingent rights theory. Ultimate sovereignty remains with the government of Canada. The existence of Aboriginal rights depends upon their recognition by Canadian authorities.[232] Macklem and Asch observe that many passages in *Sparrow* invoke the inherent rights theory. Their conclusion, though, is that other passages in *Sparrow* indicate that the Court ultimately favours the contingent approach to Aboriginal rights.[233] The Court accepted that the British Crown, and thereafter Canada, obtained sovereignty over the land that is now Canada by the fact of settlement. The Court has since said more than once that underlying sovereignty remains with the Crown.[234] Also, Aboriginal rights are protected only if they have not been extinguished. That the Crown could unilaterally extinguish Aboriginal rights before the *Constitution Act, 1982* indicates an acceptance of the contingent rights theory.[235] Asch, Macklem, and Thomas Isaac all conclude that the contingent rights theory means that the Court will not make room for Aboriginal self-government.[236]

Asch and Macklem see the Court as motivated by the desire to sustain the very concept of sovereignty over what is now Canada. Their thesis is that while the word "sovereignty" is not found in the *Constitution Act of 1867*, the Court nonetheless sees it as an important underlying concept for that constitutional document. A broad recognition of

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232 Patrick Macklem and Michael Asch, "Aboriginal Rights and Canadian Sovereignty: an Essay on *R. v .Sparrow*" (1991) 29 Alta. L. Rev. 498 at 501-503.

233 *Ibid.* at 506-508.

234 *Van der Peet, supra* note 185 at 594, 600-601. *Sparrow, supra* note 170 at 1065-1067.

235 Macklem and Asch, *supra* note 232 at 507-508.

236 *Ibid.* at 510-512, and Thomas Isaac, "Section 35 of the *Constitution Act*, 1982 and the Redefinition of the Inherent Right of Aboriginal Self-Government" [1992] 2 C.N.L.R. 6 at 8-10.

Aboriginal self-government is then viewed by the Court as undermining that concept.[237] In this vein, the Court may not be willing to recognize rights to separate justice systems since it undermines Canada's sovereignty with respect to criminal justice. If such jurisdiction is to be granted to Aboriginal communities, it will be done on terms acceptable to Parliament.

Kent McNeil takes it a step further. He sees the Court trying to preserve the existing distribution of jurisdictions between the federal and provincial governments under the *Constitution Act, 1867*. A recognition of Aboriginal self-government would upset that distribution of powers. Such a result would be undesirable for the Court, and so they articulated approaches to s.35(1) which made it harder for claims to self-government to succeed.[238] Applying McNeil's argument to criminal justice, the Court may wish to prevent Aboriginal communities from undermining the federal government's jurisdiction over criminal law, or provincial jurisdiction over the administration of justice.

The Court's treatment of s.35(1) has shown a strong aversion to upsetting the existing order. An application of the preferred result approach leads to the conclusion that the Court may decide against Mohawk claims to separate justice practices, or construe them narrowly if there is a preponderance of evidence in support of such rights. Does the Supreme Court have enough room to maneuver towards such results? The answer is probably yes. David W. Elliott criticized the *Van der Peet* tests as possessing such indeterminacy that they can lead to any possible outcome.[239] It is hard to disagree. As a previously discussed example,

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237 Macklem and Asch, *supra* note 232 at 508-512.

238 Kent McNeil, "Envisaging Constitutional Space for Aboriginal governments" (1993) 19 Queen's L.J. 95. See also Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 309.

239 David W. Elliott, "Fifty Dollars of Fish: A Case Comment on *R. v. Van der Peet*" (1997) 35 Alta. L. Rev. 759.

a concern with Mohawk claims would be that there may be a gap of a few hundred years between pre-contact justice practices and modern day justice practices. Under such circumstances, the Court may certainly conclude that too large a gap exists to satisfy the requirement of continuity between pre-contact justice practices and present day practices.

As previously mentioned though, they are not the only possible scenarios. Another scenario is based upon the *obiter dictum* in *Delgamuukw*, where the Court hinted at a willingness to consider self-government more fully in the future, and to even consider R.C.A.P.'s suggestions. If this portends a broader recognition of self-government, it likely will not go so far as *Sparrow* may have promised. More than likely it would be somewhere in between *Sparrow* and *Van der Peet*. Where exactly the parameters would be drawn for this broader recognition would at this point be purely speculative.

In conclusion, an application of the preferred results approach suggests more than one plausible scenario. One scenario is that such claims would be denied through a stringent application of the *Van der Peet* tests. The second scenario is that if the Court is faced with a preponderance of evidence in support of the existence of rights involving crime and justice, they may still subject such claims to narrow constructions. The third scenario suggests a willingness to recognize rights to self-government, and traditional criminal justice, in more general terms. With the second and third scenarios, the recognition of some Iroquois rights involving crime and justice is conceivable. As such, it is still reasonable to proceed with the rest of the thesis on the premise that the Mohawk have constitutionally protected rights to practices of traditional criminal justice.

In that event, the issue arises whether the *Charter* could apply to modify the exercise

of those rights. The next chapter explores the general question of the *Charter's* application to Aboriginal governments in light of ss. 25 and 32. Generally speaking, s. 25 provides that *Charter* rights cannot be construed so as to derogate from Aboriginal rights, while s. 32 provides that the *Charter* applies only to provincial and federal governments. Chapter 5 provides a discussion of how the *Charter* may be applied to Aboriginal rights involving crime and justice, utilizing the preferred result approach articulated in Chapter 2.

Chapter 4: Whether the Charter Binds Aboriginal Governments

As the area of Aboriginal rights to self-government and jurisdiction is still developing, it is important to address the general question of whether the *Charter of Rights and Freedoms* will even apply to Aboriginal governments.[240] Before considering specific legal rights that may conflict with traditional justice practices of the Mohawk, there are two provisions in the *Charter* which may preclude application of the *Charter* to Aboriginal governments. One is s.32, which reads:

> 32(1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

On the surface, this provision may make the *Charter* inapplicable to Aboriginal criminal justice systems since Aboriginal governments are not mentioned in the text. Section 32 will likely apply to self-government agreements between Parliament and an Aboriginal community. This is because the agreement involves an exercise of Parliament's power. What is not clear is whether s. 32 allows the application of the *Charter* to an Aboriginal inherent right to self-government under s. 35. Indeed, there are academics who argue that s. 32 cannot apply to Aboriginal inherent-right governments. However, there are also those who hold that s. 32 does make the *Charter* apply to Aboriginal governments. Their main argument is that the underlying purpose of s. 32 is to draw a conceptual distinction between government and private actors. The *Charter* is applicable to the former, but not the latter.

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240 *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

Claims to practices involving crime and justice invite the application of s.32 since it involves the exercise of a governmental function.

The other provision is s.25:

> 25. The guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7,1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Therefore, whether it is rights to a separate justice system hinted at by the *obiter dictum* in *Delgamuukw*[241] or specific practices involving crime and justice established under the *Van der Peet* tests[242], it is arguable that such rights would not be subject to the *Charter*. However, academic and judicial commentary suggest that matters may not be so simple.

An application of the preferred result approach suggests that the Supreme Court will interpret both provisions so as to maintain the applicability of the *Charter* to Aboriginal governments. The reason for this is a concern for having the protection of individual rights extend to all people within Canada. The discussion will begin with s. 32.

4.1 Aboriginal Governments and Section 32

4.1.1. Jurisprudence on Section 32

Soon after the advent of the *Charter*, a controversy developed over whether the *Charter* would be restricted to government activity or would apply to both public and private

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241 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1114-1115.

242 *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

activity. Bruce Elman and Anne McLellan, for example, advocate the former position,[243] while Dale Gibson is a leading advocate of the latter position[244].

The Supreme Court settled the controversy, at least legally, in *Retail, Wholesale and Department Store Union, Local 580[R.W.D.S.U.] v. Dolphin Delivery Ltd.*[245] This case involved a challenge to a court order banning a labor union from picketing on their employers' place of business on the basis that it infringed the freedom of expression under s.2(b) of the *Charter*. Justice McIntyre made the following announcement on behalf of a unanimous court: "It is my view that s.32 of the *Charter* specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government."[246] The Court was so adamant on excluding private activity from the scope of the *Charter* that they held that court decisions concerning private disputes are not subject to review under the *Charter*:

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of the *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* to virtually all private litigation.[247]

While *Dolphin Delivery* did draw a line between government and private actors, it

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243 Bruce Elman and Anne McLelland, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986) 24 Alta. L. Rev. 361.

244 Dale Gibson, "Distinguishing the Governors from the Governed: The Meaning of 'Government' under Section 32(1) of the Charter" (1983) 13 Manitoba L.J. 505.

245 *Retail, Wholesale, and Department Store Union, Local 580, [R.W.D.S.U.],* [1986] 2 S.C.R. 573

246 *Ibid.* at 598.

247 *Ibid.* at 600.

left open the question of where that line was to be drawn. In *McKinney v. University of Guelph*[248], the court considered a challenge to a university's mandatory retirement policy on the basis that it infringed the right to equality under s.15. As Universities had not traditionally been thought of as part of government, the Court had to start drawing the line between government and private actors.

Justice Wilson, in dissent, took the opportunity to articulate a set of criteria for determining whether an entity is government for purposes of s.32:

> 1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
> 2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
> 3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?
>
> Each of these questions is meant to identify aspects of government in its contemporary context. An affirmative answer to one or more of these questions would, to my mind, be a strong indicator that one is dealing with an entity that forms part of government. I hasten to add, however, that an affirmative answer can never be more than an indicator. It will always be open to the parties to explain why the body in question is not part of government. Likewise a negative answer is not conclusive that the entity is not part of government. It will always be open to the parties to explain that there is some other feature of the entity that the questions listed above do not touch upon but which makes it part of government.[249]

Justice Wilson then found that each of the tests could be answered in the affirmative, and concluded that the *Charter* bound the University of Guelph[250]. She would again advocate her three tests as the appropriate criteria by which to assess whether an entity is government in *Lavigne v. Ontario Public Service Employees Union.*[251]

Justice LaForest, for the majority, was reluctant to articulate specific legal tests for

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248 [1990] 3 S.C.R. 229

249 *Ibid.* at 370.

250 *Ibid.* at 371-379.

251 [1991] 2 S.C.R. 211

the application of s. 32 in the same as Justice Wilson. Indeed, Justice Wilson would later criticize LaForest's approach as "ad hoc" in *Lavigne*.[252] LaForest looked at a number of facts which could support a finding that the University of Guelph was part of government. These included creation by statute, legal status as a person, empowered to do something by government as opposed to required to do something, provision of a service or performance of an activity under federal or provincial jurisdiction, and concluded that by themselves, without more, they were not enough to warrant application of the *Charter* to the University[253].

However, he did not rule out that seemingly private entities would be subject to *Charter* review irrespective of the degree of government involvement. In a companion case to *McKinney*, *Douglas/Kwanten Faculty Association v. Douglas College*, he concluded that a community college was part of government:

> As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact.[254]

Eldridge v. British Columbia (Attorney General) is a unanimous decision which is tantamount to acceptance of two of Justice Wilson's tests. The decision was rendered by Justice LaForest, who made the following comments:

> It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any a priori elucidation. McKinney makes it clear, however, that the *Charter* applies to private entities in so far as they act in

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252 *Ibid.* at 239.

253 *McKinney, supra* note 230 at 267-276.

254 [1990] 3 S.C.R. 570 at 584.

furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it....

... it may be determined that the entity is itself "government" for the purposes of s.32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s.32(1). In such cases, all of the activities of the entity will be subject to the *Charter*.[255]

It seems clear then that the *Charter's* application is limited to government action as opposed to private action. What is also clear that the Court has been fairly inclusive in deciding what is government for purposes of s.32. But does this generous reasoning necessarily include Aboriginal self-government or powers exercised by Aboriginal governments within s.32? As the Royal Commission on Aboriginal Peoples rightly asks, what is the significance of Aboriginal government receiving no mention in the text of s.32?[256]

4.1.2 Arguments in Favour of Section 32's Application

One argument is that s.32 is not necessarily limited to the specific bodies mentioned within its text. The section does not say that the *Charter* applies **only** to those bodies. Under this theory, s. 32 draws a conceptual distinction between government and private actors. The *Charter* is to bind government in general, while private actors are excluded from its application. Therefore, Aboriginal governments are subject to review under the *Charter*. As will be seen, there are also arguments that this government vs. private actor distinction may be beside the point. Nonetheless, the Royal Commission endorsed the position that s. 32 can include Aboriginal governments:

We agree that the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the *Charter*. The wording of the section is not exhaustive. It allows for the possibility that

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255 [1997] 3 S.C.R. 624 at 659-660.

256 Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol. 2, part 1, ch. 3 "Governance" (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 227.

government bodies not specifically named in the section are subject to the *Charter's* provisions.[257]

Brian Slattery has pointed out that interpreting s.32 to include only the bodies specifically mentioned in its text may not be desirable since that could have the effect of excluding pre-Confederation statutes from *Charter* review:

> These reflections indicate that section 32(1) does *not* list the complete range of governments and legislatures whose acts are subject to the *Charter*. This section simply enumerates the main governments and legislatures in existence when the *Charter* took effect, and indicates that laws passed by those bodies after that date will be subject to review. However, laws already in force in Canada on that date are subject to the *Charter* under section 52(1), *regardless of their origin.* Otherwise all pre-Confederation legislation would be excluded.[258]

He also stated with reference to Aboriginal governments:

> [i]t is possible to argue that section 32(1) of the *Charter*, which states that the *Charter* applies to the Federal and Provincial legislatures and governments, exempts Aboriginal governments from any form of *Charter* review by failing to mention them. However, the better view is that the section does not provide an exhaustive list of governments subject to the *Charter*.[259]

Slattery doesn't state clearly why the non-exhaustive argument is the better interpretation of section 32. His discussion centered on explaining why section 25 is not a complete bar to *Charter* review of Aboriginal governments, which is provided below. Therefore, it can be assumed that his position is based on the conceptual distinction between government and private actors. One could glean from the Supreme Court's jurisprudence on s.32 support for this position. Much of their reasoning does emphasize a conceptual distinction between government and private actors. In *McKinney*, LaForest made this comment with reference to municipalities "...if the *Charter* covers municipalities, it is because 'municipalities perform a quintessentially governmental function.' They enact

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257 *Ibid.* at 231.

258 Brian Slattery, "The *Charter's* Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987) 32 McGill L.J. 905 at 914

259 Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 286, note 82.

coercive laws binding upon the public generally, for which offenders may be punished ...'"[260]

Let us consider again the following passage from *Eldridge*:

> It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by private entity is **"governmental" in nature** do not readily admit of any prior elucidation.[261] (emphasis added)

As will be seen though, those same cases also state that ultimate authority or responsibility must still originate with Parliament or the provincial governments in order for s.32 to apply.

Nonetheless, a result of emphasizing the conceptual distinction could be that the Mohawk authorities are involved in matters of criminal justice. As criminal justice would undoubtedly be an inherently governmental function, the *Charter* is then applicable to Mohawk practices of crime and justice.

Another closely related argument that could be made is that within Western liberal democracies, a historical purpose of constitutions has been to protect the individual against the power of the state. As Karen Swinton has said:

> The automatic response to a suggestion that the *Charter* can apply to private activity, without connection to government, will be that a Charter of Rights is designed to bind governments, not private actors. That is the *nature* of a constitutional document: to establish the scope of governmental authority and to set out the terms of the relationship between the citizenship and the state and those between the organs of the government.[262]

This proposition has also found its way into Supreme Court authorities. Here we have the following *obiter dictum* from Chief Justice Dickson in *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*: "The *Canadian Charter of*

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260 *Supra* note 248 at 270.

261 *Supra* note 255 at 659.

262 Karen Swinton, "Application of the Charter of Rights and Freedoms" in W. Tarnopolsky and G.A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms - Commentary* (Toronto: Carswell, 1982) at 44-45.

Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms ..."[263]

In *McKinney*, LaForest J. also had this to say:

> The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual.[264]

If one accepts this proposition, then it could be said that the underlying purpose of the *Charter* is to regulate all governmental activity within Canada that affects the rights of individuals in Canada. By necessity, this would extend to Aboriginal governments within Canada.

Another argument is based upon the notion that the rights and freedoms in the *Charter* are meant to be enjoyed by everyone within Canada. It is true that many of the rights and freedoms are explicitly worded to include everyone in Canada. Take for example the freedom of expression:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of though, belief, opinion and expression, including freedom of press and other media of communication;

Even with the limited right provisions, their wording is very inclusive. Take for example the right to counsel:

> 10. Everyone has the right on arrest or detention

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263 [1984] 2 S.C.R. 145 at 156, hereinafter *Hunter v. Southam*.

264 *Supra* note 248 at 262.

(b) to retain and instruct counsel without delay and to be informed of that right; and

The only qualification upon these rights is that the person must be under arrest or detained. Everyone within Canada who falls within that situation still has a right to counsel.

Concerns about the universal application of the *Charter* did inform the Royal Commission's conclusion that Aboriginal governments should be subject to *Charter* review:

> ... it would be highly anomalous if Canadian citizens enjoyed the protection of the *Charter* in their relations with every government in Canada except for Aboriginal governments. The general provisions of the *Charter* are designed to provide a uniform level of protection for individuals in exercising their basic rights and freedoms within Canada... This freedom should exist whether a person is located in an Aboriginal territory, a province or a northern territory. It should hold good against all types and levels of governments, whether federal, Aboriginal, provincial or territorial.
>
> ..., there would be a serious imbalance in the application of the *Charter*, one that should be avoided in the absence of explicit language to the contrary. In other words, the 'unpacking' of the rights referred to in section 35(1) should be achieved in a manner that takes account of the central position of the *Charter* in Canada's overall constitutional scheme.[265]

4.1.3 Arguments Against the Charter Applying to Aboriginal Governments

The most obvious argument against applying the *Charter* to Aboriginal governments is the one in direct opposition to the non-exhaustive argument. The text of s.32 must be interpreted as an exhaustive listing of the bodies bound by the *Charter*. Hogg and Turpel have said:

> The extent to which Aboriginal self-government is constrained by the *Charter* is not clear. Section 32 of the *Charter* provides that it applies to "the Parliament and government of Canada" and "the legislature and government of each province". The Supreme Court of Canada has held that this is an exhaustive statement of the bodies that are bound by the *Charter*. Section 32 does not contemplate the existence of an Aboriginal order of government.[266]

The most outspoken proponent of this position is Kerry Wilkins. He wrote:

> ... it [the Commission's position] is not the approach that makes the best sense of the text of s.32(1). Section 32(1) does not say - as it surely could have said, and more briefly - that the *Charter* is to apply to 'legislation and government action' generically; instead, its drafters took the trouble to itemize with

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265 R.C.A.P., *Restructuring the Relationship, supra* note 256 at 227.

266 Peter Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1997) 74 Can. Bar Rev. 187 at 205.

> some care *which* legislatures and governments were to be subject to the Charter *and* the matters in respect of which the *Charter* was to govern them.[267]

Wilkins does concede a point made by Hogg and Turpel. Self-government agreements between the federal government and Aboriginal groups may invite *Charter* application, but that is because such agreements are an exercise of the federal government's power and therefore properly within the ambit of s.32.[268] Wilkins' point is that s.32 cannot include Aboriginal governments exercising an inherent, as opposed to granted, right of self-government which is independent of either the federal or provincial governments.[269] To support his position, he provides this quote from *Dolphin Delivery*:

> Section 32(1) refers not to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word 'government' is used in s.32 it refers not to government in its generic sense - meaning the whole of the governmental apparatus of the state - but to a branch of government. The word 'government', following as it does the words 'Parliament' and 'Legislature', must then, it would seem, refer to the executive or administrative branch of government.[270]

Wilkins also makes a few other observations to support his conclusion. Unlike Brian Slattery, Peter Hogg is of the view that pre-Confederation laws would necessarily be excluded from *Charter* review[271]. Wilkins reasons if s. 32 doesn't apply to pre-Confederation laws, it can't apply to inherent-right Aboriginal governments[272]. Further, in

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267 Kerry Wilkins, "... But we Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49 U.T.L.J. 53 at 66-67.

268 *Ibid.* at 62. "Implementing Aboriginal Self-Government", *supra* note 266 at 214.

269 *Supra* note 249 at 62-63.

270 *Supra* note 243 at 598.

271 Peter Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in Tarnopolsky and Beaudoin, *supra* note 262 at 7-8. Hogg's basis for this conclusion is that such statutes were concluded at a time when Parliament and the provincial legislatures weren't even in existence.

272 *Supra* note 267 at 69.

Harrer v. The Queen[273] and *A.G. Canada v. Schreiber*[274], the Supreme Court has said that the conduct of foreign officials is not subject to *Charter* review, because they are not part of the government for purposes of s.32. He quotes the following passage from *Schreiber* to support his position that s. 32 applies only to the federal and provincial governments:

> The rights and freedoms enumerated in the *Charter* are guaranteed only against interference from actions taken by Parliament and the government of Canada, or the provincial legislatures and the provincial governments. Where there is not action by one of these entities which infringes a right or freedom guaranteed by the *Charter*, there can be no *Charter* violation.[275]

Commenting on this passage, he states: "It was as if the Supreme Court, having an easy way of avoiding the issue, made a point of under-scoring section 32's exhaustiveness on the subject of *Charter* application. These authorities make it very difficult to adopt the Commission's reading of section 32."[276] Kent McNeil has also taken the position that s.32 cannot be interpreted to include Aboriginal government. Like Wilkins, he makes a number of observations to support his conclusion that the text of s.32 cannot be interpreted so generously as the Royal Commission has done. One is that s.32 makes specific references to "Parliament and government of Canada" and "legislature and government of each province." So in *Dolphin Delivery*, Justice McIntyre said: "It is my view that s.32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government."[277]

McNeil argues that s.32 may not encompass Aboriginal governments with a structure

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273 [1995] 3 S.C.R. 562

274 [1998] 1 S.C.R. 841

275 *Ibid.* at 858.

276 *Supra* note 267 at 71.

277 *Supra* note 243 at 598.

different from what is contemplated by the text of the provision (such as an elected legislature), and McIntyre in *Dolphin Delivery*[278] He also argues that Supreme Court jurisprudence requires that ambiguities in treaties and statutes affecting the rights of Aboriginal peoples must be resolved in favour of Aboriginal rights. If s.32 is to be interpreted in a manner favourable to Aboriginal people, Aboriginal governments must be excluded from s.32.[279]

Two other arguments that he makes are based on other provisions of the *Charter*. If Aboriginal governments are included in s.32, this raises the question of whether they also enjoy the benefit of the override provision in s.33 despite the fact that s. 33 requires "an Act of Parliament or of the legislature." If the answer is no, McNeil argues this is an unjustifiable result that Aboriginal governments may be subject to *Charter* review, but without the same benefit of the override provision enjoyed by the federal and provincial governments[280]. McNeil also argues that when viewed alongside s.25 (discussed below), s. 32 must be interpreted to exclude Aboriginal governments[281].

As for the Supreme Court cases which seemed to indicate a conceptual distinction between government and private actors, those same cases also say that the federal or provincial governments must ultimately bear responsibility for the policy or program in question, or be in control of the entities in question, in order for the *Charter* to have application. Even in *Godbout v. Longeueil (City)*, which in contrast to *Dolphin Delivery* says

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278 Kent McNeil, "Aboriginal Governments and the Charter" (1996) 34 Osgoode Hall L.J. 62 at 68.

279 *Ibid.* at 71.

280 *Ibid.* at 72-73.

281 *Ibid.* at 73.

that s.32 is not an exhaustive list of the actors bound by the *Charter*, the Court still acknowledges that extending the *Charter's* application is based on federal or provincial responsibility:

> The possibility that the Canadian *Charter* might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s.32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves "matters within the authority" of the particular legislative body that created them.[282]

As indicated earlier, an argument for applying the *Charter* to Aboriginal governments is that a historical purpose of constitutions has been to enforce individual rights against state power. However, is it appropriate to think of the *Charter* just in terms of a state vs. the individual paradigm based upon classical liberalism? Some of the provisions in the *Constitution Act, 1982* contemplate the protection of collective as opposed to individual rights, including s.35 (the Aboriginal rights provision), s.25 (the 'shield' provision for Aboriginal rights), s. 27 (the multicultural heritage provision) and s.29 (protects the rights of denominational, separate or dissentient schools from being abrogated or derogated from by *Charter* rights). Richard Fader, citing these and other examples, questions the appropriateness of basing interpretation of the *Charter* upon the classical state vs. individual paradigm. It is beyond the scope of this thesis to canvass all of his arguments. Nonetheless this statement is particularly noteworthy, "It has long been recognized that Canada is a pluralistic society: There is no single vision of liberty. While the classical liberalism of individual versus state is one of the threads of Canadian society, it is not the only one."[283]

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282 [1997] 3 S.C.R. 844 at 878-879.

283 Richard Fader, "Reermergence of the Charter Application Debate: Issues for the Supreme Court in *Eldridge* and *Vriend*" (1997) 6 Dalhousie J. of Legal Studies 187 at 221.

From Robin Elliott we also have these comments:

> ... it is also clear that liberalism is by no means the only political theory upon which the drafters of the *Charter* saw fit to draw. The collectivist tradition, in which the individual is viewed as a member of one or more organic communities, and the state is seen in a more positive light, as an agency which mediates between the interests of various groups within society and by which the goals of the collectivity are advanced, is also reflected in its provisions.[284]

> The presence of this collectivist strain in the *Charter* makes the *Charter* a different kind of document than the American *Bill of Rights*. The latter contains no mention of group rights and there is nothing in it to suggest that the state was viewed as anything other than a threat to the freedom of the individual.[285]

While the *Charter* is there to protect the rights of individuals against the state, would it not constitutionally permissible to allow a legitimate exception for Aboriginal governments, especially considering the *Charter* also places some emphasis upon collective rights? Is the state vs. individual paradigm then by itself sufficient to warrant the inclusion of Aboriginal governments in s.32? The answer is perhaps not.

Another argument is based upon the idea that it may be inappropriate to have the *Charter* apply to Aboriginal governments when Aboriginal peoples themselves may not have assented to its application. McNeil makes this point:

> The Aboriginal peoples should not only be consulted, but their consent should be a prerequisite to the application of the *Charter* to their governments. It should not be forgotten that the Aboriginal peoples were not directly involved in patriation of the Constitution and inclusion of the *Charter* in 1981-82; on the contrary, there was strong opposition to patriation among them. For the *Charter* to be unilaterally imposed on their governments today through a questionable interpretation of s.32(1) would turn the clock back to a time when the Aboriginal peoples were not often given the opportunity to participate when important decisions affecting their constitutional rights were made.[286]

The *Charter* represents an agreement between federal and provincial governments to have their powers limited for the sake of certain rights and freedoms. Can the *Charter's* restraints

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284 Robin Elliott, "The Supreme Court of Canada and Section 1 - The Erosion of the Common Front" (1987) 12 Queen's L.J. 277 at 281.

285 *Ibid.* at 285.

286 *Supra* note 278 at 70-71.

on power be unilaterally imposed on inherent-right Aboriginal governments when the federal and provincial governments had to agree to it first? Wilkins argues that the *Charter* was implemented despite the lack of Aboriginal consent, and the lack of Aboriginal input in the negotiations that led to the *Charter's* ratification.[287] For Wilkins, this is all but a refutation of the constitutional balance argument. The *Charter* was designed to meet the needs of mainstream Canadian society, on the basis of European legal traditions. The process that led to the ratification of the *Charter* did not account for the traditions of Aboriginal communities. To implement the *Charter* in such communities does not redress a serious constitutional imbalance.[288]

Unless Aboriginal consent was legally required for constitutional amendment, which is dubious since Aboriginal rights could be unilaterally extinguished prior to the *Constitution Act, 1982*,[289] this sounds more like an argument about why the *Charter* should not apply than about why it cannot apply. Regardless, Wilkins has another argument against the need for constitutional balance. The *Charter* by its nature is of limited application. For example, it does not apply to private disputes. Yet the *Charter* is no less the supreme law because there are limits upon its reach. Therefore, excluding Aboriginal government from *Charter* review may represent a limit upon the *Charter's* proper sphere of application for legitimate reasons (i.e., preservation of Aboriginal culture and traditions), as opposed to a serious constitutional imbalance[290].

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287 *Supra* note 249 at 77.

288 *Ibid.* at 78.

289 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099.

290 *Ibid.* at 76-77.

Obviously some strong arguments have been made for why s.32 cannot or should not be interpreted to include Aboriginal governments. It does not necessarily follow that the Supreme Court will decide that way.

4.1.4 Application of the Preferred Result Approach to Section 32

What would the preferred result be in the Supreme Court? It would likely be the application of the *Charter* to Aboriginal governments. The following passage from *Godbout* indicates why the Court would lean towards the Royal Commission's emphasis on constitutional balance:

> Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are - as a simple matter of fact - governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies... Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.[291]

Allowing Aboriginal communities to become *Charter*-free zones would entail the undesirable result described above. Also noteworthy is *Thomas v. Norris*, which saw an Aboriginal person successfully sue fellow band members for coercing his participation in a ceremony. The ceremony was not found to be a protected right under s. 35.[292] Nonetheless, this case is often seen as a microcosm of a judicial reluctance to allow collective rights to curtail individual rights.[293] This conclusion is also strengthened by the Court's hesitancy to

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291 *Supra* note 264 at 878-879.

292 [1992] 2 C.N.L.R. 139 (B.C.S.C.)

293 For example, see Thomas Isaac, "Individual Versus Collective Rights: Aboriginal People and the Significance of Thomas v. Norris" (1992) 21 Manitoba L.J. 618.

interpret Aboriginal rights so broadly as to have profound consequences for the existing order (e.g., resource management policies).

Wilkins and the others are probably correct that excluding Aboriginal governments from the *Charter's* application is more consistent with the text of s.32. On the other hand, the text does not say that the *Charter* applies only to those bodies. It is capable of being interpreted as drawing a conceptual distinction between government and private actors. Wilkins himself concedes that, at most, s.32 does not preclude such a finding.[294]

In conclusion, an application of the preferred results approach suggests that the Court would be concerned about maintaining protection of *Charter* rights throughout Canada, as expressed in *Godbout*. As such, the Court may adopt the understanding of s. 32 articulated by the Royal Commission and certain academic lawyers that s. 32 creates a conceptual distinction between government and private actors, and therefore the *Charter* applies to Aboriginal governments. The remaining issue then is whether a separate criminal justice system as envisioned by traditional Mohawks can be characterized as governmental in nature or engaged in governmental activities. Some doubt may arise from the fact that some Mohawk justice practices seem unconventional by Canadian standards, such as banishment from the community and the emphasis on mediation. Though it is a case involving federal jurisdiction under s. 91 of the *Constitution Act 1867*, the *Margarine Reference* is pertinent in that it remains the standard test for deciding what is in pith and substance criminal law.[295] The first requirement is that the law must prohibit an activity, and prescribe a penalty for

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294 *Supra* note 267 at 71.

295 *Reference re: Dairy Industry Act (Canada) s. 5(a)*, [1949] S.C.R. 1. This authority is also confirmed in *Re: Firearms Act (Can.)*, [2000] 1 S.C.R. 783 and *R.J.R. MacDonald vs. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

violating that prohibition. The second requirement is that the law must be for a valid criminal law purpose, such as enforcing public morality, or protecting public health.[296] The practice of banishment can readily be characterized as a penalty to enforce public morality, to enforce honesty in members of the community. While the Akwesasne Code has an emphasis on mediation, the fact remains that punishments such as fines, community service, and probation may always be possible outcomes of the process.[297] As such, the Court may conclude that Mohawk practices of crime and justice are governmental activities and therefore within the ambit of s. 32.

4.2 Aboriginal Government and Section 25

The typical understanding of s.25 is that it prevents challenges by non-Aboriginals to Aboriginal and treaty rights on the basis of the right to equality under s.15 of the *Charter*.[298] A typical example is where Aboriginal fishermen have a right of preferred access to fisheries for sustenance or ceremonial purposes. More controversial though is the suggestion that s.25 completely exempts Aboriginal governments from scrutiny under the *Charter*. The Supreme Court has yet to decide a case where s. 25 was in issue. Nonetheless, the academics have taken opposing positions.

However, a common thread does emerge from early commentary on s.25. The provision shields existing Aboriginal rights from abrogation or derogation by *Charter* rights.

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296 *Margarine Reference, ibid.* at 49-50.

297 *Code of Offences and Procedures of Justice for the Mohawk Nation at Akwesasne*, draft #10, Article 6, section 7.

298 Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 314 at 32, Kent McNeil,"The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Sup. Ct. L. Rev. 255 at 262; Peter W. Hogg, *Constitutional Law of Canada* (2nd ed.) (Toronto: Carswell, 1985) at 556, 564. William F. Pentney; *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Ottawa: University of Ottawa Press, 1987) at 109; Bruce Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) at 11-12.

It does not create any new rights. William Penney states:

> The structure of the *Charter* itself indicates that s.25 is intended only as an interpretive guide and not as an independent, enforceable guarantee of Aboriginal and treaty rights. The section appears in the part of the *Charter* under the heading "General", which is separate and distinct from the part containing substantive rights guarantees. The other similar provisions under this heading are clearly not rights guarantees, although s. 28 may be interpreted as containing a substantive element.[299]

Another example of this position comes from Norman Zlotkin "This section contains a rule of statutory interpretation: it does not purport to guarantee or create rights; it merely preserves rights, whether or not they are constitutionally entrenched, from the operation of the *Charter*."[300]

Judicial opinion on s.25, scarce as it is, has confirmed this understanding. In *R. v. Nicholas and Bear*, Dickson J. had this to say "I do point out that s.25 of the *Constitution Act, 1982* confers no new substantive rights or freedoms other than the right not to have abrogated or derogated from by any other guarantee, of general application, contained in the *Charter*."[301] The same conclusion can also be found in *Steinhauer v. The Queen*[302], and *Augustine and Augustine v. The Queen; Barlow v. The Queen.*[303]

4.2.1 Arguments that Section 25 is not a Complete Exemption from the Charter

Opinions divide on the question of whether s. 25 exempts Aboriginal governments from *Charter* scrutiny. A number of commentators have suggested that while Aboriginal

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299 *Ibid.* at 109.

300 Norman Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference* (Kingston, Ont: Institute of Intergovernmental Relations, Queen's University, Discussion Paper No. 15, 1983) at 46. See also Kenneth M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (ss. 25, 35 and 37)" in Tarnopolsky and Beaudoin, *supra* note 262 at 471-72.

301 [1989] 2 C.N.L.R. 131 (N.B.Q.B.)

302 [1985] 3 C.N.L.R. 187 (Alta. Q.B.) at 191.

303 [1987] 1 C.N.L.R. 20 at 44 (N.B.C.A.)

groups may have a constitutional right to self-government, the **exercise** of that right could be subjected to *Charter* review. Aboriginal individuals still enjoy *Charter* rights enforceable against their own governments. Hogg and Turpel consider it unlikely that a court would conclude s. 25 provides blanket immunity to Aboriginal governments from *Charter* review. The basis for this conclusion is that the main purpose of s. 25 had been to shield Aboriginal rights from claims to equality rights under s. 15 in situations where Aboriginals are given preference over non-Aboriginals. Self-government had not been contemplated by the drafters of the *Charter* in 1982.[304]

Brian Slattery also draws a distinction between the existence of a right to self-government and the exercise of that right. His comments are as follows:

> What impact will the *Charter of Rights and Freedoms* have on Aboriginal governments? This is a troublesome question, allowing for a number of viewpoints. However, the most likely answer involves two propositions. First, the right of self-government enjoys protection from the *Charter* because it is covered by section 25 of the *Charter*, which shields Aboriginal rights from *Charter* review. Second, at the same time, individual Aboriginal persons also enjoy a measure of *Charter* protection in their dealings with Aboriginal governments.
>
> These conclusions are based on a distinction between the *right* of self-government proper, and the *exercise* of governmental powers under that right. The argument runs as follows. Insofar as the right of self-government is an Aboriginal right, it is not liable to be abrogated or diminished by the provisions of the *Charter* because of the shield erected in section 25. However, individual native persons are citizens of Canada and as such possess *Charter* rights in their relations with governments, including Aboriginal governments. In this respect then, the *Charter* will impose some restrictions on the manner in which Aboriginal governments treat their own constituents, so long as these restrictions do not amount to an abrogation or derogation from the right of self-government proper or from other section 25 and 35 rights.[305]

This proposition was well received by the Royal Commission:

> This approach distinguishes between the *right* of self-government proper and the *exercise* of governmental powers flowing from that right. Insofar as the right of self-government is an Aboriginal right, section 25 protects it from suppression or amputation at the hands of the *Charter*. However, individual members of Aboriginal groups, like other Canadians, enjoy *Charter* rights in their relations

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304 *Supra* note 266 at 214-215.

305 Slattery, "First Nations and the Constitution", *supra* note 259 at 286.

> with governments, and this protection extends to Aboriginal governments. In this view, then, the *Charter* regulates the manner in which Aboriginal governments exercise their powers, but it does not have the effect of abrogating the right of self-government proper.[306]

Jonathan Rudin and Dan Russell have also endorsed that distinction with specific reference to Aboriginal practices involving crime and justice.[307]

3.2.2 Arguments that Section 25 Exempts Aboriginal Governments from the Charter

The other side of course maintains that Aboriginal governments are immune from the *Charter*. In reference to the Royal Commission's position, Kent McNeil has this to say:

> In my view, this argument does not take sufficient account of the dual protection offered by section 25. In particular, it does not give the word "derogate" adequate weight. If the *Charter* applies to protect individual Aboriginal persons in their relations with their own governments, this necessarily involves a limitation on the powers of those governments which can only be characterized as a derogation from the right of self-government.[308]

Bruce Wildsmith admits that whether s.25 provides Aboriginal governments blanket immunity from *Charter* challenges by Aboriginal individuals is a difficult question. He views s.25 as a trump where a *Charter* right and an Aboriginal right come into irreconcilable conflict.[309] The trump is effective even where the protection of *Charter* rights against Aboriginal governments is concerned. However, he does qualify this conclusion by speculating that courts may still be motivated to limit the power of Aboriginal governments for the sake of *Charter* values, albeit by different avenues. He suggests a number of methods by which this could happen, such as a narrow construction of the treaty or self-government agreement in question, or use of the administrative law doctrine that the power to govern is

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306 R.C.A.P., *Restructuring the Relationship*, *supra* note 256 at 229.

307 Jonathan Rudin and Dan Russell, *Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past* (Mississauga, Ontario: Ontario Native Council on Justice, 1993) at 47.

308 Wildsmith, *supra* note 298 at74. See also Pentney, *1982*, *supra* note 298 at 111.

309 *Aboriginal Peoples and Section 25*, *supra* note 298 at 23.

not to be used unreasonably. Relief through the *Charter* itself though, would not be one of these methods.[310]

Wilkins also concludes that s. 25 exempts Aboriginal governments from the *Charter*. He makes a direct assault on Slattery's distinction between the existence and the exercise of the right to govern as follows:

> I confess that I simply do not understand this supposition. To me, a right's scope and power are what define it and give it uniqueness. A right's scope consists of the kinds and range of conduct it protects; it power is the kind and degree of protection that it gives them. When a given activity comes within the protected scope of some particular right, then engaging in that activity just is way of exercising that right. Imposing external restrictions on permissible engagement in it diminishes - derogates from - the scope or the power (or both) of the right itself and, by doing so, rearranges the right's defining coordinates.[311]

Wilkins also constructs a couple of additional arguments to support his position. The first is there is nothing in the legislative history of section 25 or in the few cases dealing with the provision to support the Commission's view.[312] However, the legislative history argument is not very compelling. In *Reference Re Section 94(2) of the Motor Vehicle Act, B.C.*, the Supreme Court attached little weight to comments found in the minutes of *The Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution* that fundamental justice in section 7 meant only procedural justice, and concluded that s. 7 also applies to substantive law as well.[313] When interpreting section 25, the Court will not be bound by legislative history either. Wilkins concedes as

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310 *Ibid.* at 50-52.

311 *Supra* note 267 at 113.

312 *Ibid.* at 114-115.

313 [1985] 2 S.C.R. 486 at 504-509.

much.[314]

Wilkins' next argument is much stronger. It is based upon judicial treatment of another interpretive provision of the *Charter*, which uses phrasing almost identical to s. 25. Section 29 reads, "Nothing in the Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." The impact of this provision has been considered by the Supreme Court. In *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, the Court held that: "s.29 is there to render immune from *Charter* review rights or privileges which would otherwise, i.e., but for s.29 be subject to such review."[315] In *Adler v. The Queen in right of Ontario,* the Court said that s.29: "explicitly exempts from *Charter* challenge all rights and privileges 'guaranteed' under the Constitution in respect of denominational, separate or dissentient schools."[316] After reviewing these cases, Wilkins makes the following perceptive remark, "This reading of section 29, which replicates the reading that most commentators, and the few decided cases, have given to section 25, leaves little, if any, room for the Royal Commission's alternative."[317]

4.2.3 Application of the Preferred Result Approach to Section 25

The arguments that s.25 is a complete bar against *Charter* review seem stronger, and more consistent with the text. At least one lower court has reached that conclusion. For example, in *Campbell v. British Columbia (Attorney General)* it was found that the right to

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314 *Supra* note 267 at 115.

315 [1987] 1 S.C.R. 1148 at 1197.

316 [1996] 3 S.C.R. 609 at 643.

317 *Supra* note 267 at 116-117.

vote in elections of the House of Commons and legislative assemblies in s.3 had no effect on a Nish'ga self-government agreement.[318] The basis for that conclusion was that any ambiguities that may exist in s. 25 would have to be resolved in favour of Aboriginal rights.[319]

However, as with s.32, the Court would probably prefer that s.25 does not exempt Aboriginal governments from the *Charter*. The reason for this is the same concern that was expressed in *Godbout*. Everyone within Canada should receive some degree of *Charter* protection. Indeed, the Court condemned the possibility that a government could unilaterally back out of any obligations to respect individual rights as an undesirable result.[320] Slattery also bases his distinction between the existence of a right to self-government, and the exercise of that right, on the need to afford Aboriginal individuals some measure of *Charter* protection enforceable against their governments.[321]

The word in s.25 that is truly an obstacle is "derogate." Slattery's distinction between the existence of the right and the exercise of that right may provide a way around this. The right of self-government itself is not abrogated or derogated from. The exercise of that right must still respect the *Charter* rights of Aboriginal persons. This is admittedly a dubious way to finesse the language of the text, but it is possible. The Royal Commission has also adopted the distinction. As such, the Court may end up adopting that distinction with reference to Aboriginal self-government.

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318 [2000] 8 W.W.R. 600 (B.C.S.C.) 605.

319 *Ibid.* at 632-633.

320 *Supra* note 282 at 878-879.

321 Slattery, "First Nations and the Constitution", *supra* note 259 at 286.

What are even greater impediments to adopting the Commission's reading of s.25 are the Court's own precedents on s. 29. Those precedents seem to leave the Court with little or no room to maneuver towards the preferred result. On the other hand, cases such as *Jobidon* indicate that the Court can sometimes go to extreme lengths when it wants a result badly enough. Recall that in *Jobidon* the Court used an old common law principle to limit the availability of a defence to assault, whereas s. 8 of the *Criminal Code* may only permit common law when it provides a defence or justification. Similarly, the Court may prefer to have the *Charter* apply to Aboriginal governments despite the wording of s.25. There may be a way for the Court to get there. A key interpretive doctrine produced by the Court is called the purposive approach. Chief Justice Dickson describes it as follows:

> In my view, the analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgement in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection.[322]

Applying this approach, what is important is that every provision in the *Charter* is to be interpreted in light of the larger objects of the *Charter*. As previously mentioned, the typical understanding s.25 is that it shields Aboriginal rights from challenges by non-Aboriginals based on the right to equality. This interpretation could be easily fitted into the "larger objects of the *Charter*" since there is also s.15(2), which protects affirmative action programs from equality right challenges. Along with these could also be grouped s. 29. In *Alder*, the Court elaborated that an underlying purpose of s. 29 was to maintain the

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322 *Hunter v. Southam, supra* note 263 at 344.

protections provided by s. 93(1) of the *Constitution Act, 1867*. Section 93(1) permits provinces to legislate in matters of education, but not in a way that prejudicially affects the rights at law of denominational schools. The Court viewed s. 93(1) as an assurance to respect certain rights of the Roman Catholic minority so as to achieve Confederation.[323] The usual understanding of ss. 25, 15(2), and 29 could all be thought of as having a common thread, the provision of special treatment or benefits to historically disadvantaged groups. This common thread can easily be included within the larger objects of the *Charter*.

Interpreting s.25 to provide Aboriginal governments with blanket immunity from the *Charter* may prove a different story. The Court would already seem inclined to having everybody in Canada protected by the *Charter* included in the "larger objects of the *Charter*." Indeed, in the quotation from *Hunter v. Southam,* Chief Justice Dickson stated that the goal of the purposive approach is to secure for individuals the full benefit of the *Charter's* protection. The Court could use the purposive approach to say that s.25 requires a different interpretation in the specific context of Aboriginal self-government[324]. That different interpretation could be that s. 25 does not provide Aboriginal governing practices immunity from *Charter* review, since this abrogates one of the larger objects of the *Charter*, ensuring the protection of individual rights for everyone within Canada.

3.3 Conclusion

Section 32 may prevent *Charter* review of Aboriginal governing practices since it only mentions Parliament and provincial governments. Section 25 may also prevent *Charter*

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323 *Supra* note 316 at 644-647.

324 This approach could also be used in a similar way for the s.32 issue.

review since it prevents the abrogation or derogation of Aboriginal rights by *Charter* rights. However, an application of the preferred results approach suggests that the Court may interpret these provisions in such a way as to make the *Charter* binding upon Aboriginal governing authorities. The reason for this conclusion is that the Court itself, in addition to the Royal Commission and academic lawyers, has expressed concern against narrowing the scope of the *Charter's* application to such a degree that many individuals would not have any protection of their *Charter* rights.

The Court may decide that the underlying purpose of s. 32 is to draw a conceptual distinction between governing authorities and private actors. Since Aboriginal authorities, particularly when acting in the sphere of criminal justice, would be engaged in governing activities, they would be subject to the *Charter*. With s. 25, the Court may use the purposive approach to adopt a different interpretation in the specific context of Aboriginal self-government. The typical understanding of s. 25 is that it shields Aboriginal rights from equality rights challenges. This could be fitted within a larger object of the *Charter*. That larger object would be providing special benefits or protections to historically disadvantaged groups. To say that Aboriginal governing authorities enjoy blanket immunity from *Charter* review, such that Aboriginal individuals enjoy no protection at all, may in contrast abrogate a different larger object of the *Charter*. That larger object would be to secure for all individuals within Canada the protection of their *Charter* rights.

The next chapter will proceed on the assumption that the debate over ss. 25 and 32 has been resolved in favour of the *Charter* applying to Aboriginal self-government. Under this assumption, Chapter 5 examines the potential impact of the legal rights provisions (ss.

7 to 14 of the *Charter*) on traditional Iroquois practices of crime and justice, using the preferred result approach described in Chapter 2.

Chapter 5: The Charter and Iroquois Justice

5.1 Dagenais

The application of the *Charter*[325] to traditional Iroquois practices involves a conflict between one set of constitutional rights (legal rights in ss. 7 to 14) and another set of constitutional rights (Aboriginal rights in s.35). A possible source of contention is what authority would be used to resolve this conflict. A potential scenario is proposed by the Royal Commission on Aboriginal Peoples in *Partners in Confederation.*[326] Drawing upon s. 35 jurisprudence and arguments supporting Aboriginal rights to enact laws in core areas vital to the survival of distinctive cultures, the Commission proposes that when federal laws and Aboriginal laws conflict, for example when both legislate in the sphere of criminal law, Aboriginal laws should become paramount and render inoperative conflicting federal laws to the extent of inconsistency. The exception is when federal law can meet the standard of justification for infringing upon Aboriginal rights in *R. v. Sparrow*.[327] The reader will recall that this test requires minimal impairment of the Aboriginal right, and adequate consultation. Adopting this approach, if federal legislation is passed which attempts to enforce *Charter* values upon Aboriginal criminal justice systems, it would to have to meet those justification requirements.[328]

Another authority for resolving the conflict could be *Dagenais v. Canadian*

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325 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

326 Royal Commission on Aboriginal Peoples, *Partners in Confederation* (Ottawa: Minister of Supply and Services Canada, 1991).

327 [1990] 1 S.C.R. 1075.

328 R.C.A.P., *Partners in Confederation, supra* note 326 at 36-37.

Broadcasting Corporation, where Chief Justice Lamer states:

> A hierarchial approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.[329]

This is a more compelling approach as it addresses judicial activity. The scenario described by the Royal Commission is mostly concerned with legislative infringements and government actions. The Royal Commission's proposition is framed in terms of legislative objectives and minimally intrusive means, as is the *Sparrow* test of justification. Neither *Partners in Confederation* nor *Sparrow* anticipate other constitutional rights which come into conflict with Aboriginal rights. However, *Dagenais* explicitly articulates a standard of equal balance when constitutional rights come into conflict. As argued below, the Court will also likely want to enforce individual rights to some degree. The standard in *Sparrow* that legal rights must be minimally intrusive upon Aboriginal rights involving crime and justice is an onerous burden to meet. On the other hand, to say that legal rights and Aboriginal rights must be balanced may represent a lower threshold which is easier to meet.

Dagenais modified the *Oakes* test by mandating an assessment of the salutary and the deleterious effects of the legislation when seeking a balance between conflicting constitutional rights. Chief Justice Lamer wrote:

> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression

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329 [1994] 3 S.C.R. 835 at 877.

of those affected by the ban.[330]

In attempting to balance Aboriginal rights and legal rights, the Court would engage in a similar analysis. The salutary effects of Aboriginal practices would be measured against the deleterious effects upon legal rights (and vice versa).

Dagenais mandates examining a large number of factors in deciding how to balance constitutional rights when they conflict. An example is *R. v. Mills*, which involved a constitutional challenge to *Criminal Code* provisions that limited the availability of third party records to an accused on the basis that this limitation infringed the right to full answer and defence.[331] The right to full answer and defence (to use the records for cross-examination) and the right to privacy of a victim (in relation to the records), both protected under s. 7 of the *Charter*, were in conflict. In weighing this conflict, the Court looked at a large number of factors, including the need to prevent the conviction of innocent persons, the use of evidence of questionable probative value that could distort the search for truth during a trial, the right to maintain a confidential identity when desired, and the importance of confidential information to a trust-like relationship.[332] When it comes to conflicts between legal rights and Aboriginal rights, the Court would likewise examine a whole range of factors, such as the need to safeguard against the conviction of innocent persons, the need to prevent the emergence of police states, the need to ensure fairness in criminal proceedings, the cultural beliefs of an Aboriginal group, Aboriginal people being disproportionately

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330 *Ibid.* at 878.

331 [1999] 3 S.C.R. 668. *Criminal Code*, R.S.C. 1985, c. C - 46.

332 *Ibid.* at 720, 726.

involved in the criminal justice system at all levels, as well as others.

In all fairness, the Court would probably try in earnest to accommodate both legal rights and Aboriginal rights. Yet a preliminary observation may be in order. Cases such as *R. v. Gladstone*, *Mitchell v. Canada (Minister of National Revenue)*, and *R. v. Pamajewon*[333] remind us that Aboriginal rights have often been treated unsympathetically by the Court. Non-constitutional interests have frequently been accommodated over Aboriginal rights. On the other hand, legal rights have often been treated very generously whereby infringements upon them can be quite difficult to justify. As one example, justifying an infringement upon the right to a fair trial can prove onerous. As and when legal rights and Aboriginal rights come into sharp conflict, an application of the preferred result approach suggests that legal rights will tend to win.

5.2 Search and Seizure

Section 8 of the *Charter* reads "Everyone has the right to be secure against unreasonable search and seizure." This protection may be of particular concern to Aboriginal peoples. There is a growing trend in Aboriginal communities to establish their own police forces staffed by members of their own communities. As an example, the Royal Canadian Mounted Police has entered into community police service agreements with communities in British Columbia, Prince Edward Island, Saskatchewan, and the Yukon. Other bands, including the Siksika in Alberta, have entered tripartite agreements with federal and

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333 *R. v. Gladstone*, [1996] 2 S.C.R. 723. *R. v. Pamajewon*, [1996] 2 S.C.R. 821. In *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911, there was a claim to a Mohawk right to trade across the border. The Supreme Court concluded that Mohawk trade before contact had followed an east-west orientation, but not a north-south orientation. Therefore, trading across the Canada-U.S. border was not allowed (at 943-949).

provincial governments.[334] Akwesasne has its own Mohawk Police Service.[335] It is then worthwhile to ask, "What can First Nations police services anticipate when it comes to rights against search and seizure?".

An important preliminary issue in s.8 cases is "What does s. 8 protect?". In its treatment of s.8, the Court has consistently maintained that the right against unreasonable search and seizure protects a person's reasonable expectations of privacy. In *R. v. Edwards*, the Court provided a list of factors to be considered in assessing whether a person has a reasonable expectation of privacy in the context of search and seizure by state authorities:

1) presence at the time of the search;

2) possession or control of the property or place searched;

3) ownership of the property or place;

4) historical use of the property or item;

5) ability to regulate access;

6) existence of a subjective expectation of privacy; and

7) objective reasonableness of that expectation.[336]

The list is non-exhaustive. The reasonableness of the expectation is to be assessed on the totality of the circumstances.[337]

Note that s.8 protects persons against unreasonable searches and seizures. In order

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334 *First Nations Policing Agreements* (Ottawa: Solicitor General of Canada, Ministry Secretariat, 1992). Robert H.D. Head, *Policing for Aboriginal Canadians: the R.C.M.P. Role* (Ottawa: Royal Canadian Mounted Police, 1993).

335 Lysane Cree, "Mohawk Community-based Policing" (1999) Canadian Human Rights Foundation Newsletter 14:3 12.

336 *R. v. Edwards*, [1996] 1 S.C.R. 128 at 145-146.

337 *Ibid.* at 145.

for a search and seizure to be reasonable, it usually must be permitted by prior authorization (a warrant) provided by someone impartial and capable of acting in a judicial capacity.[338] The written authorization must be based upon reasonable and probable grounds that the evidence, items, or persons to be searched or seized will be found at the location in question.[339] An investigative authority, in a criminal law context, cannot provide itself with its own written authorization to conduct a search or seizure. That authority is not deemed to be impartial or capable of acting in a judicial capacity.[340] The search must also be carried out in a reasonable manner (i.e., not in an abusive fashion).[341]

If a search or seizure is conducted without prior authorization, it is *prima facie* unreasonable. This presumption of unreasonableness can however be overcome by proof of factors which support the reasonableness of the search or seizure.[342] In the existing case law, there are recognized exceptions whereby warrantless searches can be deemed reasonable. One is where the accused consents to the search. In such instances, the Court requires that the accused be informed of his constitutional right not to consent, and consequences flowing from that consent (i.e., the evidence may be used against him).[343]

Warrantless searches are also reasonable in circumstances of necessity or urgency whereby police would not be able to obtain the evidence if they took the time and effort to

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338 *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 160-162.

339 *Ibid.* at 167-168.

340 *Ibid.* at 164-165.

341 *R. v. Collins*, [1987] 1 S.C.R. 265 at 278-279.

342 *Hunter v. Southam*, *supra* note 338 at 161.

343 *R. v. Borden*, [1994] 3 S.C.R. 145.

obtain a warrant. However, exigent circumstances do not create a blanket exception. Whether exigent circumstances justify or help justify warrantless searches along with other circumstances is to be assessed on a case-by-case basis.[344]

Further, if an item or items obtained are in plain view of the authority at the time they were seized, an exception exists.[345] Searches which are incidental to arrest can also be justified without a warrant. Such searches must be pursuant to a valid objective, such as assuring the safety of arresting officers, assuring the removal of objects that the accused may use to escape, and procuring of evidence of a crime with which the accused has already been charged.[346]

These limited exceptions take into account that s.8 at its very core is about restraining the powers of police in their investigation of crimes or alleged crimes. As Glen Luther puts it, "Sections 8 and 9 are first and foremost, limitations on police power."[347] At a minimum, the Court will want s. 8 to provide some measure of constraint upon police officers. This is viewed as critical to preserving liberty in Canada, and preventing the creation of a police state. For example, in *R. v. Storrey*, Justice Cory stated:

> Section 450(1) (now 495(1)) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offences of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state.[348]

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344 *R. v. Silviera*, [1995] 2 S.C.R. 297 at 370-371.

345 *R. v. Ruiz* (1991), 68 C.C.C. (3d) 500 (N.B.C.A.) at 509.

346 *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at 186.

347 Glen Luther, "Police Power and the Charter of Rights and Freedoms: Creation or Control?" (1986/1987) 51 Saskatchewan L. Rev. 217 at 218. Section 9 of the *Charter* reads, "Everyone has the right not to be arbitrarily arrested or detained".

348 [1990] 1 S.C.R. 241 at 249.

In *R. v. Stillman*, the police seized scalp hairs and buccal swabs from the accused even though he refused consent. The Court came down strongly on this occurrence, offering the following rationale:

> It serves as a powerful reminder of the powers of the police and how frighteningly broad they would be in a police state. If there is not respect for the dignity of the individual and the integrity of the body, then it is but a short step to justifying the exercise of any physical force by police if it is undertaken with the aim of solving crimes. No doubt the rack and other stock in trade of the torturer operated to quickly and efficiently obtain evidence for a conviction. Yet repugnance for such acts and a sense of a need for fairness in criminal proceedings did away with those evil practices. There must always be a reasonable control over police actions if a civilized and democratic society is to be maintained.[349]

A more recent statement is provided in *R. v. Mentuck*: "A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state."[350]

If there is a conflict between s.8 and any rights protected under s.35, the *Dagenais* test mandates a balance. However, the preferred result may be to uphold s. 8 protections without having to balance them with Aboriginal rights protected under s. 35. One reason of course would be the potential for police states to emerge in Aboriginal communities. Another reason is that the law on search and seizure already contains considerable accommodation towards police powers and duties. Another reason is that cultural context and community expectations may be relevant in analyzing whether an Aboriginal accused has a reasonable expectation of privacy. This in turn may support further exceptions consistent with Aboriginal policing practices as long as the core concept of preserving the individual from the abuse of state power is maintained.

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349 [1997] 1 S.C.R. 607 at 660.

350 (2001) 205 D.L.R. (4th) 512 (S.C.C.) at 537.

In addition to the aforementioned exceptions, whereby warrantless searches are reasonable, the test of reasonable expectation of privacy as applied by the Court through several cases has produced a variety of results. A warrantless search of an individual's private residence will usually attract a high degree of scrutiny under s.8.[351] Searches which intrude upon the bodily integrity of a person, such as strip searches, rectal searches, and taking blood samples, likewise invite a high degree of scrutiny.[352] On the other hand, in other contexts, a lower expectation of privacy has been found. A lower expectation of privacy applies when customs officers exercise their duties at border crossings and airport terminals.[353] A lower expectation of privacy also applies to students when school authorities conduct searches and seizures. The authorities then need only reasonable belief. It is a lower threshold than reasonable and probable grounds.[354]

If Aboriginal police authorities will be required to respect the rights in s.8, they can also expect the benefit of the exceptions which lower standards of privacy. An example can be found in the Akwesasne Code.[355] Article 2 - section 1, reads:

> A. It is unlawful for any person to abuse the collective Aboriginal rights of free border crossing for the sale of, or transporting of, any alien person, liquor, drugs, stolen goods, weapons or any items not sanctioned by the Mohawk Council of Akwesasne, Mohawk Council of Chiefs or St. Regis Tribal Council.
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> 1. A violation of this section is a serious offence.

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351 *R. v. Kokesch*, [1990] 3 S.C.R. 3 at 29.

352 *R. v. Pohorestsky*, [1987] 1 S.C.R. 945 at 949, *R. v. Greffe*, [1990] 1 S.C.R. 755 at 795.

353 For border crossings, see *R. v. Simmons*, [1988] 2 S.C.R. 495 at 528-529. For airport terminals, see *R. v. Monney*, [1999] 1 S.C.R. 652 at 678-679.

354 *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393 at 421-422.

355 *Code of Offences and Procedures of Justice for the Mohawk Nation at Akwesasne*, draft #10.

The reason why the Court has lowered the expectation of privacy for border crossings in *Simmons* and *Monney* is that it recognizes the prevention of contraband from crossing the Canadian border as an important objective.[356] The Court in turn may be willing to recognize the merit of the offence defined in Article 2 - Section 1 of the Akwesasne Code. As such, officers of the Mohawk community performing searches for violations of this offence at their border may well expect to be held to the *Simmons* standard. In other words, it may be constitutionally permissible for officers to search personal belongings, or even conduct strip searches, on a less stringent standard than reasonable and probable grounds.

Also, the *Edwards* tests for determining reasonable expectations of privacy requires a Court to look at the totality of the circumstances. It may well be that the cultural beliefs of an Aboriginal accused may form part of this totality of the circumstances. A possible example can be suggested. It is well known that Aboriginal notions of property are often different from those of western society, the former having a greater emphasis on the collective good. Suppose that a clan leader, or an elder, or a person of similar traditional authority gives consent to a police officer to conduct a search and seizure in relation to the accused's residence or belongings. If an Aboriginal accused accepts the leader's authority as a matter of traditional belief, an argument could be made that the accused has a lower expectation of privacy. On the other hand, if an accused eschews traditional beliefs and claims to have been acculturated, it can be argued with equal vigor that the expectation of privacy is not lowered.

In all likelihood, the Court probably sees the present law as already providing an

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356 *Supra* note 352, *Simmons* at 528, and *Monney* at 678-679.

appropriate balance between s.8 rights and interests which conflict with those rights. Within the Court's decisions, this balancing of interests becomes clear. In *Simmons*, Chief Justice Dickson wrote:

> I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function.[357]

In *M.(M.R.)* we also read:

> A reasonable expectation of privacy, however, may be diminished in some circumstances. It is lower for a student attending school then it would be in other circumstances because students know that teachers and school authorities are responsible for providing a safe school environment and maintaining order and discipline in the school.[358]

The Court may already see its standards and exceptions carved within s. 8 as striking the right balance between competing interests. There already exist several exceptions to the requirement of a prior warrant based upon reasonable and probable grounds, which accommodate police powers and duties. Furthermore, jurisprudence on s. 8 may already contain an open-ended mechanism, the test of reasonable expectations of privacy, for accommodating Aboriginal perspectives. Would it then be eager to have Aboriginal rights and the *Dagenais* test complicate things even further? Would it want to see s. 8 rights diluted even further by Aboriginal rights under s.35? An educated reply is that the answer is no. However, where there is a conflict of *Charter* rights and s. 35 rights, it may be difficult for the Court to justify applying the law on s. 8 in full force to Aboriginal police authorities

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357 *Supra* note 352 at 528.

358 *Supra* note 353 at 414.

since *Dagenais* requires a balance between the two.

The problem for Aboriginal people is that modern-day police practices may not form the subject matter of an Aboriginal right protected by s. 35. William Newell states that when the grand council of the Iroquois met for a witchcraft trial, the nation took matters in hand by bringing the offender to justice.[359] George-Kanentiio also states that responsibility for obtaining satisfaction for the victim of a crime rested with the family or clan of the victim.[360] This may entail investigative activity to discover who performed the deed. On the other hand, Arthur C. Parker writes, "There were no houses for punishment, no police. The standard of behavior was enforced by means of ostracism and by social persecution."[361] It seems clear that the Iroquois, in their daily lives, were usually involved in activities other than enforcing the law and investigation of crimes. Activities such as hunting, fishing, and farming come readily to mind. Yet they may have been willing to act as enforcers and investigators as and when the occasion demanded it. What would not have been a part of Iroquois tradition is a formal, professional, and centralized police agency that enforces the law and actively investigates crime on a full-time basis. This conclusion may be strengthened by the observation that private justice was occasionally, though rarely, exercised by the Iroquois before contact.[362] One of the key points behind a centralized police force is to prevent the exercise of private justice.

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359 William B. Newell, *Crime and Justice Among the Iroquois Nations* (Montreal: Caughnawaga Historical Society, 1965) at 47-51.

360 Douglas George-Kanentiio, *Iroquois Culture and Commentary* (Santa Fe, New Mexico: Clear Light Publishers, 2000) at 99.

361 Arthur C. Parker, *An Analytical History of the Seneca Indians* (Rochester: New York State Archeological Association, 1926) at 29.

362 *Crime and Justice Among the Iroquois, supra* note 359 at 53-54.

It is worth noting that when Aboriginal communities have their own police services, the officers have often had to use methods analogous to community enforcement. Robert Depew writes:

> Native policing may be observed to operate in the context of reciprocal constraints that are derived from a variety of social relationships and, therefore, is shaped and directed by the interests of the wider community. The obvious theoretical implication here is that non-urban, traditional native communities are structured in such a way that community responses to crime and deviance are likely to take precedence over those of a formal, centralized police agency, at least in certain circumstances.[363]

A survey of police officers working in Aboriginal communities conducted by criminology professors Chris Murphy and Don Clairmont found a recurrent theme in the responses from many of the participants. They often found that to be effective at their work, they often had to develop a more informal style of police work. This included giving breaks for minor offences, getting to know everybody in the community, encouraging people to settle disputes outside of the justice system, and involving community agencies in problems that arose. Murphy and Clairmont were unsure whether this reflected practicality on the part of the officers, or whether it was produced by traditional mores and values of the community.[364]

At any rate, it is dubious whether modern-day police practices involved with the active investigation of crimes, the searching an individual's dwelling, and seizing evidence therefrom had any presence in the traditional life of any Aboriginal community. Any Aboriginal community, the Mohawk included, would be hard pressed to make claims under the *Van der Peet* test to rights to engage in those practices associated with modern police

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363 Robert Depew, "Policing Native Communities: Some Principles and Issues in Organizational Theory" (July 1992) 34 Can. J. Crim. 461 at 463.

364 Chris Murphy and Don Clairmont, *First Nations Police Officers Survey* (Ottawa: Solicitor General of Canada, Minister Secretariat, Ottawa, 1996) at 41-42.

forces.[365]

The reader will recall that *Delgamuukw* hints at the possibility of a broader recognition of self-government rights.[366] The fact that Aboriginal title is collective suggests some ability to make decisions about the land and the right to enforce them. *Delgamuukw* also suggests the content of title is to be determined by taking into consideration traditional laws, again implying the existence of institutions to make and pass laws.[367] Even so, claiming rights to specific practices in conflict with the right against unreasonable search and seizure may prove elusive. Even if it is argued that the Court departed from *Van der Peet* in the area of laws concerning land rights, the Court also made it clear that land uses cannot be irreconcilable with the nature of the communities' attachment to the land.[368] An analogous argument could be made regarding practices of search and seizure in Akwesasne. Consensus-based processes would be reconcilable with Aboriginal concepts of crime, justice, and dispute resolution. Unrestrained searches and seizures conducted by a centralized police agency, creating the danger of a police state, would not.

In conclusion, the Court may already see its jurisprudence on s. 8 as maintaining an appropriate balance between the privacy interests protected by s. 8 and the law enforcement concerns that inform exceptions to s. 8's requirements. The law on s. 8 may also already provide a mechanism, the test of reasonable expectations of privacy, whereby Aboriginal perspectives could be accommodated. The Court's preferred result may be that it would not

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365 *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

366 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1114-1115.

367 *Ibid.* at 1100.

368 *Ibid.* at 1083.

want s. 8's protection complicated or diluted even further by rights claimed under s. 35. Further, whether *Van der Peet* or *Delgamuukw* applies to establishing Aboriginal criminal jurisdiction, the Court is likely to insist that there be some basis in pre-contact Aboriginal tradition. Consequently, practices such as search and seizure associated with modern day police forces are unlikely to receive recognition under s.35(1) unless it can be proven that there is continuity with pre-contact practices or that such practices are reconcilable with traditional practices of crime and justice. As such, search and seizure by Aboriginal police authorities will probably be subject to *Charter* standards, allowing for recognized exceptions and reasonable expectations of privacy which may be modified even further by Aboriginal perspectives.

5.3 The Presumption of Innocence

Another *Charter* protection that may be invoked against Mohawk practices of crime and justice is the right of an accused to be presumed innocent until proven guilty. The classic statement of the requirement of proof of an accused's guilt beyond a reasonable doubt is found in the English case of *Woolmington v. Director of Public Prosecutions*, where Viscount Sankey wrote:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.[369]

This "golden thread" is now a constitutional right under s. 11(d) of the *Charter* which reads:

> Any person charged with an offence has the right

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[369] [1935] A.C. 462 (H.L.)

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Whether a law violates the presumption of innocence depends upon that law's effect on the verdict rendered by the trier of fact. If the law creates the possibility of conviction, despite a reasonable doubt as to guilt on the part of the trier of fact, the right to be presumed innocent is infringed.[370] It must be borne in mind that this concerns whether there is a limitation of the right to be presumed innocent. As will be discussed later, limitations can still be justified under s.1. In the years since 1982, the net for catching invalid laws and procedures has been cast very wide. Requiring the trier of fact to presume an essential element of the offence, intent of an accused to traffic a narcotic in one's possession, unless the accused proves otherwise on a balance of probabilities violates s.11(d).[371] Requiring a presumption of a collateral fact necessary to lay a charge (the accused was in care and control of a vehicle) as opposed to an essential element (the accused was in an intoxicated state) also violates s.11(d).[372] Requiring presumption of a relevant fact, that an accused was living off the avails of a prostitute he was regularly in the company of, unless the accused raises evidence to the contrary, violates s.11(d).[373] Requiring the accused to prove a defence to a charge, insanity for example, also violates s.11(d).[374]

Applying s. 11(d) to the Akwesasne Code, issues arise concerning aspects of the

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370 *R. v. Oakes*, [1986] 1 S.C.R. 103, and *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

371 *Ibid.*, *R. v. Oakes* at 132-135.

372 *R. v. Whyte*, [1988] 2 S.C.R. 3.

373 *R. v. Downey*, [1992] 2 S.C.R. 10..

374 *Chaulk*, *supra* note 370 at 1328-1335.

Code that may violate the presumption of innocence. Article 6 - section 1(c) reads, "A conviction of a serious offense is only to be found when all Justices on the Tribunal reach a consensus." Article 6 - section 2(c) is a verbatim duplicate of section 1(c) except that "grievous"is substituted for "serious." In the definitions section of the Code (Article 8), a tribunal is a hearing consisting of three Justice Chiefs. The rule of consensus also applies to minor offences, where mediation and settlement are required. Article 6 - section 3 reads:

> A minor offence is heard by two Justice Chiefs. It shall be the duty of the Justice to attempt to mediate the matter until a settlement is reached. If a settlement cannot be reached after all parties are heard, the Justices will reach a consensus and then pronounce the findings.

The standard of proof beyond a reasonable doubt is not to be found in the Akwesasne Code. Would this be a *prima facie* violation of s.11(d)?

The Court's jurisprudence on the presumption of innocence, where the constitutionality of a presumption is at stake, depends in large part upon the construction of hypotheticals. The hypotheticals inquire as to whether a law creates the risk of conviction despite a reasonable doubt on the part of the trier of fact. For example, in *Downey*, the Court hypothesized that a trier of fact may decide that an accused living off the avails of prostitution may not have been proven beyond a reasonable doubt in a case. In such a case, the trier of fact must still convict the accused if evidence to the contrary has not been raised by the accused. Therefore, the law creates a risk of conviction in the absence of proof beyond a reasonable doubt.[375] It seems likely that the Court would also hypothesize in deciding whether the Akwesasne Code's provisions create the possibility of conviction despite a reasonable doubt. A member of the Tribunal is not required to apply the standard

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[375] *Supra* note 373 at 30.

of proof beyond a reasonable doubt. As will be discussed in greater detail in the next section, the Code also has an emphasis on mediation. This in turn can invite a Justice to consider objectives other than determining an accused's guilt, such as restoration of community harmony. He or she may have a reasonable doubt as to an accused's guilt, but not being required to decide on that basis, may join in a consensus with the other members of the Tribunal regardless (e.g., for the sake of community harmony). This creates the possibility of conviction despite a reasonable doubt. The Longhouse councils, such as the one conducted at Kahnawake, would likewise be found to violate the presumption of innocence. Whoever conducts the council or tribunal would doubtless want to be convinced of an accused's guilt before handing out a sentence of disposition. However, this does not entail applying the formal standard of proof beyond a reasonable doubt. If the presumption of innocence and Iroquois practices conflict, how might this conflict be resolved?

Despite the Court's generous interpretation on what amounts to a violation of the right to be presumed innocent, the Court has also shown remarkable deference towards legislative bodies when assessing the justification of those violations under s. 1 of the *Charter*. Three sets of circumstances arise where the Court has been inclined towards deference on this issue.

The Court has often made a distinction between laws that resolve competing interests or protect vulnerable groups, and laws that pit the state as a singular antagonist against the accused.[376] The former deserves a greater degree of deference. The latter deserves greater scrutiny under the *Charter*. An example of where the protection of a vulnerable group

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376 *Irwin Toy v. Quebec (A.G.)*, [1989] 1S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

resulted in greater tolerance for a violation of the presumption of innocence is *Downey*. For the sake of providing protection to women as a vulnerable group, the Court held that requiring an accused to raise evidence to the contrary to defeat a presumption of an essential element of the offence was justified.[377]

Another exception applies when the facts are presumed because of considerable repercussions for prosecutions and the administration of justice. An example is *Chaulk*, where the Court held that requiring the accused to prove insanity on the balance of probabilities was justified since requiring the Crown to prove sanity beyond a reasonable doubt would have tremendous repercussions for the administration of justice.[378]

Another scenario where deference occurs is in the context of regulatory offences. In *R. v. Wholesale Travel Group Inc.*, a majority of the Court held that requiring an accused to prove due diligence on the balance of probabilities as a defence to a regulatory offence was justified under s.1.[379] Justice Cory went so far as to say that the impugned law did not violate the presumption of innocence. His conclusion was based upon a contextual approach to *Charter* rights. *Charter* rights mean different things in different contexts. The presumption of innocence has a certain meaning in the context of "true criminal offences", and a different one in the context of "regulatory offences." To treat the presumption of innocence differently when it came to regulatory offences depended upon two justifications. His first justification was the licensing justification. When a person (individual or corporate) engages

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377 *Supra*, note 373.

378 *Supra* note 370 at 1337.

379 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. Lamer C.J.C. and Sopinka J. at 204. LaForest J. at 209-210.

in a regulated activity, that person consents to accepting responsibility towards the public, and the consequences for the public that may flow from engaging in that activity. The second justification was the vulnerability justification. Requiring the accused to prove due diligence was necessary for the sake of protecting society, especially its vulnerable members.[380]

From these exceptions, a certain type of preferred result can be gleaned with regards to the right to be presumed innocent. The Court perceives that there are certain social ills which are pressing or urgent in nature such that the ability to prosecute them must be to some degree accommodated. These include the protection of vulnerable groups in society such as children or racial minorities, or the harmful effects that can flow from unregulated industries and technologies (e.g., pollution). This, coupled with the fact that obtaining evidence to prove such crimes can be difficult, often convinces the Court to lighten the burden upon the prosecution for those offences. If this is often the preferred result where the Canadian justice system is concerned, then the Court may be willing to extend it to Aboriginal prosecutions of similar offences and all the more so when such prosecutions may be protected as Aboriginal rights.

These exceptional circumstances recognized in s. 11(d) jurisprudence have a limited presence within the Akwesasne Code. Since the system it envisions depends upon consensus between Justice Chiefs, it does not contain any formal standards of proof. However, the Code contains a number of offences where the vulnerable groups exception could apply. Prostitution of children (article 1 - section 6(a)), and of adults (subsection b), are examples

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380 *Ibid* at 224-234.

of offences designed to protect vulnerable groups. The Code also contains numerous offences that could be classified as "regulatory." Examples include commercial or personal misrepresentation (article 2 - section 6), failure to exercise proper control over domesticated animals (article 2 - section 9), hunting or fishing without a subsistence purpose and without a commercial license (article 3 - section 1), and polluting the environment (article 3 - section 3).

For these types of offences, with the possible exception of rape or sexual abuse[381], the Court may not insist upon proof beyond a reasonable doubt. The real question is, whether the consensus system provides sufficient protections in place of these lesser though still formally articulated burdens of proof, such as the balance of probabilities.

The issue of whether consensus-based decision making is sufficiently consistent with the presumption of innocence is underscored when we consider "true" criminal offences, such as murder. Would the court insist upon proof beyond a reasonable doubt? Where the Akwesasne Code is concerned, the answer is perhaps no. The consensus requirement represents a formal safeguard designed to protect against the conviction of an innocent person. What may strengthen such a conclusion is that the Code contains criteria both for the removal and selection of Tribunal justices. The Mohawk Nation Council, the St. Regis Mohawk Council, and the Akwesasne Mohawk council through a consensus select the Tribunal justices. They are required to do so upon the basis of exemplary behavior,

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381 *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577. The Court struck down s. 276 of the *Criminal Code*, which prohibited cross-examination on a complainant's past sexual history with limited exceptions. To avoid a vacuum in the law, the Court went on to say that judges have a common law discretion to prevent cross-examination on past sexual history if it is solely for the purpose of showing that a complainant is more likely to consent on the basis of past sexual activity, or that the complainant is less worthy of belief as a witness by reason of past sexual activity (at 630-636). Section 276 was subsequently modified. The Supreme Court upheld the new version of s. 276 in *R. v. Darrach*, [2000] 2 S.C.R. 443.

impartiality, and moral character among a few other things. The Code also contains procedures for the removal of Justices with sufficient cause (corruption, immoral behavior).[382] The additional presence of these provisions may convince the Court to accommodate what the Code envisioned. Canadian judges are selected by similar criteria of course, yet they are often still held to the standard of proof beyond a reasonable doubt. Nonetheless, the Akwesasne Code's provisions reflect traditional practices that provide safeguards against convicting innocent persons, that set standards for judicial integrity, **and** may be protected as Aboriginal rights under s. 35(1) and therefore deserving of accommodation under the *Dagenais* test.

In a sense, the Court's treatment of the presumption of innocence can be likened to a cost-benefit analysis. They are willing to condone **some** risk of the conviction of an innocent person when another important interest is at stake. The consensus system of the Akwesasne Code may be framed as a right to a traditional practice of deciding matters of crime and justice on the basis of a consensus. As such, it may merit constitutional protection as an Aboriginal right. The consensus system is also part of a mediation system aimed at certain objectives such as rehabilitation and the restoration of community harmony. As will be discussed in greater detail in the section on Aboriginal non-adversarial processes, the Court has to some degree recognized the merits of alternative dispute resolution in criminal justice. In addition to these factors, the consensus system is itself a safeguard against the conviction of innocent persons. Therefore, the cost-benefit analysis that seems implicit in the Court's treatment of the presumption of innocence may lead to accommodation of the

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382 *Supra* note 355, Article 6 - section 9 for the selection of Justice Chiefs, and Article 6 - Section 13 for removal of Justices.

consensus system in the Code.

On the other hand, if the determination of guilt or innocence depends solely upon an adjudicator's discretion, absent any formal standards, the potential deleterious effects (a greater number of innocent convictions) would outweigh any salutary effects that can be attributed to preserving Aboriginal processes. This line of reasoning is supported by Chief Justice Lamer in the *Motor Vehicle Reference* case: "It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law."[383] Also in *Oakes*, the Court comments on the deleterious effects that flow from an innocent conviction as follows:

> An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial.[384]

In conclusion, the Court may prove quite accommodating to several Mohawk practices that appear to conflict with the right to be presumed innocent. The Court has often lightened the burden of proof in relation to certain types of offences. These include regulatory offences, and offences designed to protect especially vulnerable members of society. If the Court is willing to accommodate the Canadian justice system in such circumstances, it may also be willing to extend that accommodation to Aboriginal criminal justice systems. Where the consensus system of the Akwesasne Code is concerned, it may

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383 *Reference re Section 94(2) of the Motor Vehicle Act, B.C.*, [1985] 2 S.C.R. 486 at 513.

384 *Oakes, supra* note 369 at 119-120.

be constitutionally protected as an Aboriginal right. It has an emphasis on mediation, the merits of which has been recognized to some degree by the Court. It is also itself a safeguard against the conviction of an innocent person. For these reasons, the Court may be willing to accommodate the consensus system instead of insisting upon a formally articulated standard of proof beyond a reasonable doubt. On the other hand, to allow conviction of an accused solely on the basis of unfettered discretion is not something the Court is likely to countenance. In such instances, the Court may deem the risk of conviction of an innocent person too great to allow.

5.4 Adversarial vs. Consensus-Based Processes

A potential source of conflict between Aboriginal and non-Aboriginal justice systems is the question of reliance upon adversarial processes to ascertain legal truths. The Canadian justice system is an adversarial system. Within very general terms, Canadian Aboriginal groups can be said to have used consensus-based rather than adversarial processes before contact. How each system is defined and how each operates is best understood by describing the differences between them. A stark distinction between adversarial and consensual processes is the means by which an end result is achieved. In an adversarial process, each side competes with the other through a variety of means (cross-examination, oral and written arguments, etc.) to convince the final arbiter (the judge) that its position is the correct one. Daniel Kwochka contrasts this with consensual processes as follows:

> While retributive justice is focused on public vengeance, deterrence, and the provision of appropriate punishment through an adversarial process, restorative justice is concerned with repairing the damage or harm done to victims and the community through a process of negotiation, mediation, victim

empowerment, and restitution.[385]

Another difference is who makes or influences the final decision. Speaking to the distinction between adversarial and consensual processes, Philmer Bluehouse and James Zion write:

> Adjudication uses power and authority in a hierarchical system. A powerful figure makes decisions for others on the basis of "facts" which are developed through disputed evidence, and by means of rules of "law" which are also contested by the parties... In sum, adjudication is a vertical system of justice which is based on hierarchies of power, and it uses force to implement decisions.
>
> In contrast, mediation is based on an essential equality of the disputants. If parties are not exactly equal or do not have equal bargaining power, mediation attempts to promote equality and balance as part of its process. It is a horizontal system which relies on equality, the preservation of continuing relationships, or the adjustment of disparate bargaining power between the parties.[386]

Canada is seeing a number of efforts to revive consensus-based processes in Aboriginal communities through sentencing circles. They include Hollow Water in Manitoba, Kwanlin Dun in the Yukon, and the Dene in the North West Territories.[387] Properly understood, these processes allow elements of consensus-based processes into a sentencing hearing after the adversarial process has already determined the question of guilt or innocence. Though many judges who hold sentencing circles try to accommodate the recommendations of participants, the final decision is still the judges' to make.

Indeed, the Akwesasne Code contains similar elements of mediation in its processes. Article 6 - section 1(c), and Article 6 - section 3 of the Code require Justice Chiefs to reach a consensus on whether an accused is guilty of a serious or minor offence respectively. Those sections also require a consensus on the disposition or outcome of a case (e.g.,

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385 Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Saskatchewan L. Rev. 153 at 158.

386 Philmer Bluehouse and James Zion, "Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony" (Summer 1993) 10:4 The Mediation Quarterly 328 at 328-329.

387 David Cayley, *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives* (Toronto: House of Anansi Press Limited, 1998) at 187, 192; Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books Canada Ltd., 1996) at 29-37.

appropriate punishment). The Code also encourages every participant in a case to work towards a consensus on the appropriate disposition. Article 6 - Section 5, reads in part:

> E. The Tribunal of Justices asks the accuser and witnesses in turn, what each thinks would be a just and equitable solution or end to the matter.
>
> H. The Tribunal of Justices ask the accused and each of his witnesses in turn what they think would be a just and equitable solution or end to the matter.

As with sentencing circles, this is not quite a consensus in the purest sense. The Code envisions a process that is somewhere in between adversarial justice and consensus-based processes. While elements of consensual process are adopted, the Justice Chiefs still render final decision on whether an accused is guilty and what is to be the final disposition.

Nonetheless, the question of the *Charter*'s impact on such processes remains pertinent. The Court is explicit on what type of process the *Charter* mandates, insofar as determining guilt or innocence. In *R. v. Swain*, Chief Justice Lamer said: "The principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of the person. These principles require that an accused person have the right to control his or her own defence."[388] While the Akwesasne Code requires Justice Chiefs to render final decisions, it is doubtful whether the traditional Mohawks who drafted the Code would want all the trappings of adversarial justice such as cross-examination imposed upon its procedures. Rupert Ross argues that the use of adversarial processes in Aboriginal communities can create problems insofar as cultural values are concerned. He writes:

> ... western law puts people through adversarial processes, necessarily *adding* to the feelings of antagonism between them. Traditional teachings, not surprisingly, suggest that antagonistic feelings within relationships are in fact the *cause* of antagonistic acts. Traditional law thus requires that

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[388] *R. v. Swain*, [1991] 1 S.C.R. 933 at 936.

justices processes must be structured to *reduce*, rather than escalate, that antagonism.[389]

This applies in the Akwesasne context regardless of whether its minor offences under the Code, or the evaluative processes of the Justice Chiefs for serious offences (s. 6(1)).

Looking to the Code itself, applying the *Charter's* requirement of adversarial processes to the Code could present special problems because the Code's provisions collapse features of the consensual process and the determination of guilt or innocence together. For example, anyone participating in a trial of a serious offence may present evidence to the Tribunal of Justices hearing the case (Article 6, Section 5). Justice Chiefs are also encouraged to consider all affected interests in the community in reaching a decision. These are considerations that go beyond an accused's guilt or innocence, and appropriate sentence.

Indeed, an important difference between the adversarial system and the Akwesasne Code is that the Code makes no mention of an accused's right to cross-examine. Cross examination is an important means by which the adversarial process tests the veracity of testimony. Cross examination does not enjoy a similar importance in consensus-based processes though. This is not to say that the processes of the Code are unconcerned with ascertaining the truth of what has happened. However, it has a different emphasis. Recall that Article 6 - sections 5(e) and 5(h) state that the Justice Chiefs ask the accused, the accuser, and witnesses for both what they think would be a just and equitable solution to the matter. Implicit in this may be that the Justice Chiefs can ask questions of anyone who presents evidence. Indeed, a Grand Tribunal of Justices that hears an appeal from a trial may ask any party involved to provide an oral statement (Article 6, section 8). The Akwesasne

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389 *Supra* note 387 at 271.

Code's processes do involve ascertaining the truth of what happened, but with a more inquisitorial emphasis. However, under the principles of fundamental justice an accused has the right to cross-examine witnesses for the prosecution. Justices Cory, Iacobucci, and Bastarache together had this to say in *R. v. Rose*: "... the right to make full answer and defence has links with the right to full disclosure and the right to engage in a full cross-examination of Crown witnesses, and is concerned with the right to respond, in a very direct and particularized form, to the Crown's evidence."[390] Justice Cory also has this to say in *R. v. Osolin*:

> It is of essential importance in determining whether a witness is credible. Even with the most honest witness, cross-examination can provide the means to explore the frailties of testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing.[391]

Does this mean that the Court will read the right to cross-examine into the Akwesasne Code itself? Will it impose the right on other non-adversarial processes as well? Obviously there is considerable potential for constitutional requirements of an adversarial process and traditional practices of restorative justice to come into conflict. How would the Court resolve it?

The Court may accommodate traditional processes, to a point. One reason is that the existing criminal justice system has made a significant, if guarded, allowance for non-adversarial processes. The use of sentencing circles as an alternative to the conventional sentencing hearing has gained a measure of acceptance with some Canadian judges. Milliken

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390 [1998] 3 S.C.R. 262 at 319.

391 [1993] 2 S.C.R. 313 at 663.

J. stated in *R. v. Morin*:

> A pre-sentence report is usually done by a probation officer who interviews the persons necessary to give him or her the information covered in the report. It appears to me that the same type of information is obtainable at a sentencing circle, where the persons who would give the information to the probation officer for a pre-sentence report are present in the circle. If a pre-sentence report can be used by a judge to gain information about the offender, then why can't a sentencing circle be used for the same reason?[392]

In *R. v. Nicholas*, Desjardins P.C.J. said:

> It is very important that the judge be willing not only to convene the circle but to allow the development of the circle to originate primarily from the community. He or she must be prepared to relinquish his or her mentality of power and control with only one exception; the ultimate decision, and he or she should be prepared to adopt the decision of the circle so long as it falls within the scope of a fit and proper sentence. If I had retained control of who participated and the form of the process, the community participation would have been perfunctory.[393]

Further, pre-trial conferences are expressly provided for in section 625.1 of the *Criminal Code*. This section anticipates non-adversarial dispute resolution, which reads:

> Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court, or a judge of the court, before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held, may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters.

Rupert Ross has this to say:

> Until recently, plea discussions involved only the Crown and the defence lawyer jointly analyzing the strength of the admissible evidence, and deciding what charges would be proper, as well as discussing whether a guilty plea would be appropriate and, if so, whether they can agree on suggesting a particular range of sentence to the judge. Because trials are costly, judges are now supervising many such pretrial hearings, seeking to encourage as much agreement as possible. In those hearings, they review the case with the two lawyers and give their opinions on points of law, on the likely verdict and on the range of sentence they consider appropriate if a guilty plea is entered.[394]

Another reason is that the Supreme Court itself has recognized that there is a serious

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392 [1994] 1 C.N.L.R. (Sask Q.B.). See also M. Nemeth "Circle of Justice: Northern Villagers Take Part in Sentencing" (September 19th 1994) MacLeans 52.

393 (1996) N.B.J. no. 214 at para. 19 (Q.L.) (N.B. Prov. Ct.).

394 *Supra* note 387 at 244.

problem with the over-representation of Aboriginal people in the Canadian justice system at all levels. In *R. v. Gladue*[395] the Supreme Court had to deal with s. 718.2(e) of the *Criminal Code*, which reads, "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." Chief Justice Lamer commented:

> The drastic over-representation of Aboriginal peoples with both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out Aboriginal offenders for distinct treatment in s.718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavor to remedy it, to the extent that a remedy is possible through the sentencing process.[396]

He also recognized that traditional Aboriginal processes based on consensus and mediation should be a part of the solution as follows, "In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the Aboriginal perspective."[397] This applies only to sentencing hearings after guilt or innocence has been determined. It is nonetheless recognition by the Court that consensual processes may produce salutary effects in relation to the over-representation of Aboriginal peoples in the criminal justice system.

Indeed, there is statistical evidence that an infusion of consensus-based elements into the process can produce success. Approximately five years after the Family Group Conferences based partly on Maori traditions were implemented in New Zealand, half of all young offender custody facilities were shut down, and prosecutions of persons aged

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395 [1999] 1 S.C.R. 688.

396 *Ibid.* at 722.

397 *Ibid.* at 728.

seventeen to nineteen dropped by 27%.[398] Rupert Ross reports that in a nine-year period in which 43 offenders have gone through the Hollow Water healing process, only two had repeated their offences.[399]

The above discussions suggest the Court may be more flexible about the requirement of adversarial processes where the facts are undisputed. In an effort to strike a balance under *Dagenais*, the Court may also be willing to extend this flexibility to scenarios that would normally be the subject of a trial. Rupert Ross describes one such scenario:

> As a separate issue, it should be noted that many of the charges in the North occur when the accused is so intoxicated that he or she claims no memory of the event. At present, offenders must choose either to plead guilty on the basis of police summaries or to call for a full-blown trial so they can hear from the witnesses directly. If they choose a trial, their plea of "not guilty" really just means "I don't know." That all-or-nothing scenario could be avoided through a more informal pretrial process, where witnesses relate what took place either directly to the accused (though perhaps in a less adversarial manner) or indirectly, to a group whose word and judgment the accused accepts.[400]

Another scenario could be where the accused performed the deed, but has had a troubled life and/or performed the act in an extremely emotional state. The facts of *Gladue*, the case where the Court admonished judges to accommodate Aboriginal perspectives during the sentencing process, are worth noting. The accused killed her common law husband because she became enraged both by his being with another woman, and by his verbal taunts. The victim had also physically abused her in 1994. While her trial was pending, she was undergoing counseling for alcohol and drug abuse.[401]

The point at which accommodation may stop is where there is a live issue going to

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398 Ross, *supra* note 387 at 23.

399 *Ibid.* at 36.

400 *Ibid.* at 245-246.

401 *Gladue*, *supra* note 395 at 695-698.

the guilt or innocence of the accused. One example may be where only circumstantial evidence is provided against the accused. Another situation may be eyewitness testimony under circumstances where its reliability is open to question (identification occurred in circumstances of poor lighting, the witness is shortsighted). In such situations, the Court may insist that whichever process an Aboriginal community has in place, the accused has the right to defend him or herself in adversarial fashion.

So long as non-adversarial processes do not present a real and substantial risk to rights to a fair trial, and to full answer and defence, they may be allowed. In such circumstances, their salutary effects, rehabilitation, crime reduction, and cultural accommodation, are not exceeded by the deleterious effects. If a non-adversarial process, or those who run the process, present a real and substantial risk to a right to a fair trial and full answer and defence, there may be an insistence on protecting those rights.

5.4.1 Natural Justice

Another concern with consensus-based processes is that without a system of rules to impose consistency and fairness, and without lawyers to play the role of advocates, the process can in practice produce unfair results. As Coyle explains:

> Critics of ADR argue that the resolution of disputes with a legal content, outside the procedural safeguards of the court process, risks leading the exploitation of parties who are not equipped to bargain as equals with the powerful... Critics argue that without the information available under court discovery processes and without access to a third-party neutral with power to enforce the law without regard to rank or wealth, disputants who lack resources or strong alternatives to negotiation are vulnerable to being ignored or exploited by those with greater resources.[402]

He adds, "Some commentators have pointed to empirical evidence that negotiation parties that enjoy a significant power imbalance appear more prone to non-cooperative,

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402 Michael Coyle, "Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?" (1998) 36 Osgoode Hall L.J. 625 at 647.

manipulative, or exploitative behavior."[403]

Some commentators have pointed out that the fairness of consensus-based processes is especially crucial in Aboriginal communities. In Aboriginal communities, some of them very small, where everybody may know everybody else and where some will enjoy greater power and influence than others, can it be taken for granted that an accused will be treated fairly? Can a small community always be trusted to treat a victim fairly? Mary Crnkovich makes this comment:

> ..., that "the community" is a relatively homogeneous unit. This assumption overlooks the fact that even relatively small settlements are segmented by such considerations as wealth, gender, family connections, inherited or acquired authority, and so on. Unless these inequalities are acknowledged and attended to, they can easily undermine the equality with which the pursuit of a common good is assumed to endow the sentencing circle.[404]

David Cayley further adds:

> A place is not always a community. For many native groups, a settled way of life is no more than two or three generations old. Old family rivalries persist in the new circumstances and are complicated when the new political structure created by elected band councils is overlaid on older patterns of influence and authority. The assumption that there is an identity of interest in these circumstances is questionable.[405]

Joyce Dalmyn has observed that such realities can also taint the sentencing circle:

> ... if the feather gets passed around and no-one makes any comment whatsoever, I have heard a judge state, right on the record, "Well it's clear that because nothing has been said, obviously they're not willing to say anything good about this person therefore I can only draw the conclusion that there's no sympathy for this person and I have to use the harshest penalties available to me."[406]

Ross Gordon Green also cautions: "A concern with these community sentencing and

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403 *Ibid.* at 649. The commentators he refers to are C.W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2nd ed.) (San Francisco: Jossey-Bass, 1996) at 334 and R.J. Lawicki *et al.*, *Negotiation* (2nd ed.) (Chicago: Irwin, 1994) at 401-402.

404 Cayley, *supra* note 344 at 206. The quote is Cayley's description of Crnkovich's views in his words.

405 *Ibid.* at 207.

406 Quote is in Ross Gordon Green, "Aboriginal Community Sentencing and Mediation: Within and Without the Circle" (1997) 24 Manitoba L.J. 77 at 113.

mediation approaches is that local involvement should not become a forum for the application of political pressure to the advantage of local elite and to the detriment of politically unpopular or marginalised offenders or victims."[407]

In addressing this concern, Green admonishes judges conducting sentencing circles to be ever mindful that part of their role is to provide a buffer between the accused and the whims and passions of the local community. What happens when the processes are run and controlled by the Aboriginal communities themselves by virtue of rights under s. 35? What happens when those in control of the process (the Iroquois Justice Chiefs for example) are themselves members of the community? Concerns for fairness and impartiality are likely to result in some restrictions being imposed on Aboriginal processes.

This conclusion is supported by cases such as the *Motor Vehicle Reference.* This case is significant mostly for making substantive criminal law subject to the standards of s. 7. However, another important aspect of the decision is that the principles of fundamental justice demand that criminal proceedings abide by the tenets of natural justice, or procedural fairness.[408] The Court is likely to insist that consensus-based processes in Aboriginal communities also reflect principles of natural justice. This could see the application of doctrines from both administrative and criminal law to Aboriginal justice processes. For example, in looking at the selection of Justice Chiefs for cases and community standards, the Court may ask whether the reasonable person in place of the accused (or the victim) would have had a reasonable apprehension of bias. In doing so, the Court would consider whether

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407 *Ibid.* at 114.

408 *Supra* note 383 at 512-513.

those in charge of the process actually demonstrate bias towards the person in question, or if the process is tainted by the appearance of bias. An example of an appearance of bias is where the judge, or mediator, has a close familial or personal connection with one of the parties. In small Aboriginal communities, this particular doctrine could prove disruptive of Aboriginal efforts to establish their own processes. As a member of a small community, could an Aboriginal judge or mediator not be connected with any given party? This particular issue will be addressed in the conclusion of the thesis.

Another requirement of natural justice may be that the results of consensus and mediation processes in the Akwesasne Code are subject to review. As with trial judges who have actually heard the evidence, the Court may accord Aboriginal bodies a measure of deference. However, because of an equal emphasis on the concept of a fair hearing, these decisions when challenged could be measured according to standards found in ss. 686 and 687 of the *Criminal Code.* These tests include whether a determination was unreasonable, whether it was unsupported by the evidence, whether it produced a miscarriage of justice, and whether a sentence or disposition was demonstrably unfit.

In conclusion, courts have recognized that non-adversarial processes have some place within the Canadian justice system. They have even recognized that such processes may have salutary effects, such as addressing the problem of Aboriginal over-representation at all levels of the justice system. As such, the Supreme Court may accommodate Aboriginal rights to consensus-based processes to a point. The line may be drawn where there is a live issue, or dispute about facts going to an accused's guilt or innocence. In such instances, the Court may decide that an accused has the right to defend him or herself in adversarial

fashion. However, even where facts are not in dispute there are concerns in Aboriginal communities about how fairly such processes will be administered. As such, the Court may hold restorative processes to the standards of natural justice in order to ensure fairness.

5.5 Right to Counsel

Section 10(b) of the *Charter* reads:

> Everyone has the right on arrest or detention
> (b) to retain and instruct counsel without delay and to be informed of that right; and

It is quite conceivable that Aboriginal authorities, left to their own discretion, may not desire a right to counsel as part of the justice systems they envision. For its part, the Akwesasne Code makes no mention whatsoever of a right to counsel. Further, if an Aboriginal right to use traditional processes exists, it may include a right to exclude lawyers unless advocates had been a part of the traditional system. Consequently there is potential for conflict between Aboriginal rights and a right to counsel.

A prerequisite to the right to counsel is that the accused must be detained. The test for whether there is detention was described by Le Dain J. in *R. v. Thomsen* as follows:

> 1. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
>
> 2. In addition to the case of deprivation of liberty by physical constraint, there is a detention within s. 10 of the Charter, when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have legal consequences and which prevents or impedes access to counsel.
>
> 3. The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.
>
> 4. Section 10 of the Charter applies to a great variety of detentions of varying duration and is not confined to those of such duration as to make the effective use of *habeus corpus*

possible.[409]

Once there is detention, the police are under an obligation to inform the accused of his right to counsel. This is known as the informational component of the right to counsel, for which there are several rules:

1) A detainee must also be informed of access to Legal Aid, where the detainee meets the prescribed financial criteria.[410]

2) A detainee must be informed of access to duty counsel, who will provide free, immediate, and temporary legal advice, provided such services exist in the jurisdiction. If a toll free number for duty counsel exists, it must be provided.[411]

3) The information provided must be timely, comprehensive, and comprehensible.[412]

4) There is no constitutional requirement to determine whether the detainee understands his or her rights, unless that detainee provides positive indications of otherwise.[413]

5) There is a fundamental relationship between the right to counsel and the right to be informed of the reasons for arrest or detention under s.10(a). If there has been a fundamental or discrete change in the purpose of the investigation, one involving an unrelated or more serious offence, the detainee must again be informed of the right

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409 *R. v. Thomsen*, [1988] 1 S.C.R. 640 at 649.

410 *R. v. Bartle*, [1994] 3 S.C.R. 173, at 194-196, and *R. v. Brydges*, [1990] 1 S.C.R. 190.

411 *Ibid.* at 198.

412 *R. v. Pozniak*, [1994] 3 S.C.R. 310 at 319.

413 *R. v. Evans*, [1991] 1 S.C.R. 869 at 891.

to counsel.[414]

6) If an accused initially expresses a desire to consult counsel, but indicates a change of mind, police must inform him of his right to counsel again.[415]

Once the informational component has been satisfied, there is next the implementational component of the right. Police must provide the detainee a reasonable opportunity to exercise his right to counsel. There are also a number of rules:

1) The obligation to provide a reasonable opportunity does not arise until the detainee expresses a desire to exercise his right in response to the informational component.[416]

2) Until the reasonable opportunity has been provided, police may not continue to question or otherwise elicit incriminating evidence from the detainee. They must hold off.[417]

3) The police may however question or elicit evidence from the accused without the reasonable opportunity where there exist exigent circumstances. Mere evidentiary or investigate expediency does not amount to exigent circumstances.[418]

4) Jurisdictions are not required to implement a duty counsel system. Where none exists though, the meaning of a reasonable opportunity to consult counsel will be affected. The police may be required to wait until the next day to continue their

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414 *Ibid.* at 893.

415 *R. v. Prosper*, [1994] 3 S.C.R. 236 at 274.

416 *R. v. Manninen*, [1987] 1 S.C.R. 1233 at 1241.

417 *Ibid.* at 1242.

418 *Prosper, supra* note 415 at 275.

investigations.[419]

5) If an accused is not reasonably diligent about exercising his right to counsel, the police duty to hold off until a reasonable opportunity is provided is suspended.[420]

6) A detainee must be provided the opportunity to consult counsel in privacy, whether or not the detainee expresses a desire for privacy.[421]

7) A detainee may waive his right to counsel, though the standard is high. The waiver must be clear and unequivocal, free and voluntary, and made with full knowledge of the rights being surrendered.[422]

David Tanovich argues that the right to counsel is a particularly important right since it is by representation by counsel that other rights are enforced.[423] Alan Young also has this to say:

> As 'champion' of the interests of the accused, defence lawyers bear the burden of ensuring that their client's constitutional rights have been respected by police, prosecutors and judges. Therefore, in the absence of some institutional mechanism for supervisory, quality control over the process, the implementation of constitutional rights is contingent upon the competency of counsel.[424]

This relationship between the right to counsel and other constitutional rights also resonates in the Court's treatment of s.10(b). In *R. v. Manninen* we read, "The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and

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419 *Ibid.* at 266-270.

420 *R. v. Tremblay*, [1987] 2 S.C.R. 435 at 439.

421 *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.) at 155.

422 *R. v. Smith*, [1991] 1 S.C.R. 714 at 728-729.

423 David M. Tanovich, "Charting the Constitutional Right of Effective Assistance of Counsel in Canada" (1994) 36 Criminal L.Q. 404.

424 Alan Young, "Adversarial Justice and the Charter of Rights: Stunting the Growth of the "Living Tree"" (1997) 39 Criminal L.Q. 362 at 365.

obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights."[425] The Court reiterated this comment almost verbatim in *R. v. Ross*.[426] The Court has recognized that the role of lawyers as defenders of civil liberties is an important justification for allowing the legal profession to establish self-governing bodies (law societies). In *Pearlman v. Manitoba Law Society Judicial Committee*, the Court quoted with approval this passage from the Report of the Professional Organization Committee (Ministry of the Attorney General of Ontario):

> Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favor in the protection of individual rights and civil liberties against incursions from any source, including the state.[427]

Given these values, it is likely that the Court will insist that Aboriginal individuals must have to some degree a right to counsel. Yet Aboriginal authorities may not want lawyers as participants in their processes. *Dagenais* again mandates a balance assuming that Aboriginal process is established as an Aboriginal right. The Court may try in earnest to reach a balance, but how? An educated guess can perhaps be ventured here.

A theme that is occasionally found in the Court's jurisprudence on legal rights is that the principles of fundamental justice mean different things in different contexts. In *R. v. Lyons*, the Court decided that the accused was not constitutionally entitled to have the determination of his dangerous offender hearing decided by a jury.[428] In so doing, Justice

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425 *Supra* note 416 at 1242-1243.

426 *R. v. Ross*, [1989] 1 S.C.R. 3 at 14.

427 Ontario Professional Organizations Committee, *Report of the Professional Organization Committee (Ministry of the Attorney General of Ontario)* (Toronto: Ministry of the Attorney General of Ontario, 1980) at 26. Quoted in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 887.

428 *R. v. Lyons*, [1987] 2 S.C.R. 309 at 354.

Iacobbucci wrote:

> It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness. It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.
>
> Suffice it to say, however, that a jury determination is not mandated in the present context. The offender has already been found guilty of an offence in a trial at which he had the option of invoking his right to a jury. Moreover, the procedure to which he was subjected, subsequent to the finding of guilty does not impact on his liberty to the same extent as that initial determination.[429]

Likewise, in *Swain*, the common law rule allowing the Crown to adduce evidence of the accused's insanity was altered into a general prohibition against that practice. The reasoning was that it compromised the accused's ability to control his defence, and in turn assert his right to liberty unless proven guilty according to law.[430] However, once a guilty verdict has been entered, the Crown may then adduce evidence of insanity. There is no longer a danger to the accused's right to control his or her own defence.[431]

From this line of jurisprudence, one can glean a rough correlation between the nature of the proceedings and the requirements of fundamental justice. Where the accused's guilt or innocence remains an unsettled issue, the requirements of fundamental justice tend to be more stringent. Where the issue of guilt has been more or less resolved, the requirements tend to become more relaxed. Like the previous discussion on adversarial versus mediation processes, the Court may well insist that a right to counsel exists in situations where guilt or innocence is not a settled issue. What this may mean is that a right to counsel may be enforced at the investigative stage, to prevent police authorities from compelling an accused

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429 *Ibid.* at 361.

430 *Supra* note 388 at 975-977.

431 *Ibid.* at 986-988.

from incriminating himself. It may also be enforced at a proceeding where the facts grounding the accusation are open to dispute, whereby the accused would be allowed to defend himself in adversarial fashion.

On the other hand, where the use of consensual processes may be appropriate in place of an adversarial contest over whether the accused is guilty, the Court may well be willing to condone an exclusion of lawyers as advocates from the process. In the previous discussion on these processes, it had been suggested that the Court recognizes that such processes can produce considerable salutary effects. The Court may be willing to allow an exclusion of lawyers if they are convinced that the participation of lawyers as advocates could undermine the salutary effects of consensus-based processes.

Indeed, some have suggested that the presence of lawyers may actually inhibit the effectiveness of non-adversarial processes. Larry Chartrand states that the overriding goal of the sentencing circle is to reach a consensus, find a common solution that not only rehabilitates the accused and heals the victim, but also improve the health of the community in general. If lawyers are there performing their duties of advocacy, it runs the risk of derailing the whole process of reaching a consensus.[432] Ross also makes a comment that implies that the lawyer's role in the adversarial system can be counterproductive:

> ... Western law puts the parties through adversarial processes that inevitably add to the level of antagonism between them. Traditional wisdom suggests that antagonism within relationships is in fact the cause of those adversarial acts, and traditional law thus commands that justice processes be structured in ways to reduce that antagonism and bring health and understanding back to those relationships.[433]

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[432] Larry Chartrand, "The Appropriateness of a lawyer as advocate in contemporary Aboriginal justice initiatives" (Aug 1995) 33 Alberta L. Rev. 874.

[433] *Supra* note 387 at 271.

This conclusion may be strengthened where an accused willingly participates in a non-adversarial process since that often implies a choice not to contest his guilt, or many of the facts that ground the accusation against him. As Ross relates constantly in his writings, the emphasis is not so much on whether the act has been committed, but on exploring the broader reasons as to why and on finding a common solution.[434] The Hollow Water Team, and sentencing circles in general, require an acceptance of responsibility as a prerequisite to the process.[435]

This conclusion is founded upon a dichotomy between a guilt determination process and processes where guilt has by and large already been established. Such a distinction is supported by *Lyons,* which cautions us that, "While the legal classification of the proceeding as part of the process does not necessarily decide the question of the scope of the procedural protection to be afforded the offender, ..."[436] But at the same time, *Lyons* immediately acknowledges that "... the functional, factual considerations animating that conclusion must be taken into account."[437]

In conclusion, Aboriginal groups may be able to claim an Aboriginal right to exclude lawyers as advocates from traditional consensual processes. This must then be somehow balanced with a conflicting *Charter* right to counsel. The Supreme Court may end up drawing upon the distinction that was suggested in the earlier discussion on non-adversarial

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434 *Ibid.* at 27-28.

435 *Ibid.* at 33-34.

436 *Supra* note 428 at 361.

437 *Ibid.* at 361.

processes. Where the issue of guilt or innocence is unsettled, the right to counsel may be enforced. This may include the investigative stage of the criminal process, or a proceeding where the facts that ground an accusation of a crime are disputable. On the other hand, particularly when the facts are by and large not disputable, the Court has also recognized that traditional Aboriginal restorative processes are capable of salutary effects such as rehabilitation and crime reduction. They may be willing to condone an exclusion of lawyers from traditional processes if convinced that lawyers as advocates could undermine such processes.

5.6 Right to Silence

Although there does not exist a "right to silence" provision in the *Charter*, the Supreme Court has recognized that the principles of fundamental justice under s. 7 of the *Charter* protect a general right against self-incrimination. At the core of the right is allowing an accused to decide for himself whether to provide evidence against himself to authorities, or more broadly speaking whether to say anything at all to authorities.[438]

As with the right to counsel, detention is usually a prerequisite to the engagement of the right. Upon detention, the right to silence has many facets within the criminal process. It includes a right not to be compelled to testify at trial[439], and a right to remain silent during pre-trial investigations by authorities.[440] If authorities in disguise are used to garner confessions, they are all but prohibited from actively eliciting evidence. At best, they can

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438 *R. v. Hebert*, [1990] 2 S.C.R. 151 at 173-175.

439 *Ibid.* at 173-175, and *R. v. Noble*, [1997] 1 S.C.R. 874.

440 *Ibid.* at 164.

wait and passively receive the evidence.[441] There is also the right not to have the trier of fact (jury) invited to make an adverse inference on the basis of not testifying.[442] If an accused is compelled to testify at a public inquiry, he has the right not to have his testimony read into evidence at his trial. He may even apply for exclusion of evidence derived from his testimony (real evidence) if it could not have been found or its significance could not have been appreciated but for his testimony.[443] An accused may possibly have himself excused altogether from testifying at a public inquiry if it can be established that it would cause undue prejudice at his trial.[444]

Obviously there are many dimensions to this general right. Its potential implications for Aboriginal justice systems may be considerable. For purposes of this thesis, only one specific context will be considered, the Iroquois practice of banishing an individual for lying a fourth time after three warnings. For the Iroquois, banishment meant permanent expulsion from the nation. Unless and until he could be accepted into another group, he was on his own for a lifetime. It could be argued that banishment, in and of itself, does not amount to punishment. As long as imprisonment is not involved, banishment may be an acceptable sanction. However, Article 8 of the Akwesasne Code defines banishment as follows: "restricted from entering the Mohawk Territory at Akwesasne and/or loss of Mohawk privileges and benefits as granted by treaties and law and through custom." Banishment, as

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441 *R. v. Broyles*, [1991] 3 S.C.R. 595 at 609-612.

442 *R. v. Chambers*, [1990] 2 S.C.R. 1293 at 1316, and *Noble*, *supra* note 439.

443 *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 at 561.

444 *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at 46-47.

defined by the Akwesasne Code and as practiced by the Iroquois before contact, may constitute punishment because it implicates another *Charter* right. Section 6 of the *Charter* reads:

> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
> (b) to pursue the gaining of a livelihood in any province.

In *United States of America v. Cotroni*, the Court had this to say: "..., the central thrust of s. 6(1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community."[445] The Court affirmed this understanding of s. 6(1) in *United States v. Burns*.[446] The Court may decide that banishment is a punishment because it is a consequence that is contrary to *Charter* values, albeit under s. 6(1). Where Aboriginal persons are concerned, the severity of banishment may even be more acute. Aboriginal legal scholars Patricia Monture-Okanee and Mary Ellen Turpel stated, "Banishment is the most severe remedy available under aboriginal systems of justice. It means the end of social and cultural life with one's community."[447]

What is remarkable is that the Longhouse council case documented by Russell and Rudin gave the youths a verbal warning about the consequences of lying four times after they had lied to **the police**. In the common law world, evidence of the accused having lied to authorities may form the basis for an attack on an accused's credibility. But to attach a

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445 [1989] 1 S.C.R. 1469 at 1480-1481.

446 [2001] 1S.C.R. 283 at 313.

447 Patricia Monture-Okanee and Mary Ellen Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) U.B.C.L. Rev. (Special Edition) 239 at 248.

criminal sanction to it may require considerable justification indeed. The practice of banishing an individual who lies four times is a punishment that would traditionally be dispensed by a judicial authority in the community. Silence before police authorities could also be construed as deceit or not telling the truth. To administer punishment as a consequence flowing from lying to the police, or refusing to speak to them, would engage the accused's right to silence under s. 7. The question then becomes one of how the conflict may be resolved by the Court. An application of the preferred result approach suggests that the Court may allow banishment for lying four times when the lying occurs in circumstances analogous to the *Criminal Code* offences of obstruction of justice and perjury.

As with s. 8, an important concern underlying the right to silence is to prevent the emergence of a police state. In a sense, the concern is even broader here. At the core of the right is the desire to prevent state authority, at virtually every stage of criminal proceedings, from compelling an accused to condemn himself. In *R. v. S. (R.J.)*, the Court quoted with approval this passage from *Thompson Newspapers*: "The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on a slippery slope towards the creation of a police state."[448] In *Hebert*, the Court had this to say: "The state has the power to intrude on the individual's physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques

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448 *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restorative Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 480; quoted in *S.(R.J.), supra* note 392 at 504.

made possible by its superior resources and power."[449] And later: "The scope of the right to silence must be defined broadly enough to preserve for the detained person the right to choose whether to speak to the authorities or to remain silent, notwithstanding the fact that he or she is in the superior power of the state."[450] Though this will receive more detailed coverage in a subsequent section, the legal tests for exclusion of evidence as a remedy for breach of a *Charter* right also reflect the importance a court attaches to preventing the state from compelling an accused from incriminating himself. An important part of the legal tests is whether the *Charter* violation involved compelling the accused to incriminate himself or produce evidence of the alleged offence against himself. If the evidence is obtained by such compulsion, it will almost invariably be excluded without consideration of any other factors. In short, the Court has made some strong statements about how the right to silence is necessary to prevent the creation of a police state.

However, the existing criminal justice system does criminalize lying under certain circumstances. Obstruction of justice is an offence under s. 139(2) of the *Criminal Code*. It reads in part: "(2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years." Even after the advent of the *Charter*, there have been prosecutions for obstructing justice when an accused has lied to a police officer in the course of a pre-trial investigation.[451] Justice Cory

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449 *Supra* note 438 at 179-180.

450 *Ibid.* at 180.

451 *R. v. Hanneson* (1989), 71 C.R. (3d) 249 (Ont. C.A.). The Court held that a violation of the right to counsel did not insulate the person detained from a subsequent prosecution for obstructing justice where the inadmissable statements are the *actus reus* of the offence.

had this to say with reference to obstruction of justice:

> It is true that a witness has no legal obligation to assist the police in their investigation. ... Yet once a witness does speak to the police in the course of their investigations, they must not mislead the investigating authorities by making statements that are false. The right to say nothing cannot protect a witness from the consequences of deliberately making a false statement.[452]

The Court may insist that a Mohawk accused has the right to say nothing during a pre-trial investigation. If that right is violated, the accused then has a right to a remedy under s. 24(2) (the exclusion of evidence), or maybe even s. 24(1) (remedy for breach of a *Charter* right). However, if a Mohawk accused voluntarily makes a statement with the intention to mislead authorities, the use of banishment as a consequence for lying four times may be permissible. It is important to note that saying nothing at all is not obstruction of justice, but a voluntary statement intended to mislead authorities is. The Court may be willing to allow banishment as a consequence for the latter, but not the former.

It could be argued that the Court may hesitate to permit the practice because banishment would be an especially severe sanction for an Aboriginal person. On the other hand, obstruction of justice carries a maximum penalty of imprisonment for ten years. As will be seen, perjury carries a maximum penalty of imprisonment for fourteen years. It is generally accepted that substantial prison terms can be handed to someone who commits this type of offence just once. Where the Mohawk are concerned, it involves a sanction against a person who lies repeatedly in circumstances analogous to obstruction of justice or perjury. As such, the Supreme Court may still accommodate the practice.

There is also perjury, a crime that is punishable to a maximum of fourteen years under s.131 of the Criminal Code. The Court may allow the practice of banishment for lying

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452 *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 at 819.

under circumstances analogous to what constitutes perjury, in a hearing before Justice Chiefs and the accused testifies. The real question is whether the Court would allow Justice Chiefs to compel an accused to testify. Article 6 - section 5 reads:

> F. The accused states the facts and present physical evidence on his behalf.
>
> G. The Accused may have witnesses state facts and present evidence on his behalf as well as witnesses who will attest to his character.

Note that subsection G phrases the use of witnesses on behalf of the accused as an option. The requirements of subsection F are not an option. There is also no mention of a right to silence within the Code. Unlike the general right to silence under s.7, there is a specific provision for a right not to testify at trial, s. 11(c). In *R. v. Amway of Canada Ltd.*, the Court said that the underlying purpose of s.11(c) is to prevent the prosecution from compelling the accused to supply evidence from his or her own mouth.[453]

As with confessions obtained by coercion or by trickery before trials, the Court also sees compelled testimony as a dangerous road towards a police state. Chief Justice Lamer had this to say in *Hebert*:

> The privilege against self-incrimination, like the confessions rule, is rooted in an abhorrence of the interrogation practised by the old ecclesiastical courts and the star Chamber and the notion which grew out of that abhorrence that the citizen involved in the criminal process must be given procedural protections against the overweening power of the state.[454]

It is worth quoting *Thompson* again: "The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on a slippery slope towards the

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453 [1989] 1 S.C.R. 21.

454 *Supra* note 438 at 174.

creation of a police state."[455] Clearly, the Court sees compelled testimony as posing considerable danger of allowing the state excessive power in compelling individuals into incriminating themselves. Indeed, the use of the word "abhorrence" in *Hebert* indicates a firm attitude on this point. The preferred result for the Court here may be to not allow compelled testimony during proceedings under the Akwesasne Code.

As previously mentioned, the Court is more likely to sympathize with Aboriginal customs if there is similarity between them and the Canadian justice system. Where sharp conflict occurs, fundamental justice will tend to prevail over Aboriginal rights, which have often been treated unsympathetically to the point of being frequently trumped by non-constitutional interests. There may be two sets of circumstances where the Court would permit the practice of banishment for lying four times. One is where the accused voluntarily makes a statement to authorities with the intention to mislead. The court may insist that an accused has a right to say nothing during a pre-trial investigation. The reason again is to prevent creation of a police state. If the right to silence is violated, the accused is entitled to a remedy under s. 24(1) or s. 24(2). However, if the accused voluntarily makes a statement to authorities with the intention to mislead, it may be constitutionally permissible for him to face banishment as a potential sanction. The statement is made in circumstances analogous to the obstruction of justice, which is an offence under the *Criminal Code*. Another situation where the Court may accommodate the practice is in circumstances analogous to perjury. The Court may insist that an accused has a right against being compelled to testify at trial. However, if the accused voluntarily testifies, it may be permissible for the accused to face

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[455] *Supra*, note 448.

banishment as a potential consequence. A reason for this is that perjury as an offence has long required the taking of an oath or a solemn affirmation to tell the truth, which puts a witness on notice that he or she is under a duty to tell the truth. That oath or affirmation must also be given before someone in a position of judicial authority. The Court may very well recognize Justice Chiefs as such an authority. Given the importance of oaths and affirmations in the justice system, the Court may even go so far as to require a similar undertaking from the accused before he testifies before a Longhouse Council or trial before Justice Chiefs.

5.7 Exclusion of Evidence

The efficacy of a law depends upon the availability of remedies as a means of redressing transgressions of that law. *Charter* rights are no exception. In criminal law, the most important remedial provision under the *Charter* is s.24(2), which reads:

> Where, ..., a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in proceedings would bring the administration of justice into disrepute.

This provision in particular, and its interpretation, could pose drastic problems for traditional approaches to justice since the exclusion of evidence would be an alien concept. What follows is a brief overview of s.24(2) jurisprudence.

A prerequisite to the application of s.24(2) is that the evidence must be obtained in a manner that infringed a *Charter* right. The Court rejected causation as the determining factor. If there is temporal proximity between the *Charter* violation and the obtaining of the evidence, s.24(2) applies.[456] However, the concept of causation has not been entirely

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456 *R. v. Strachan*, [1988] 2 S.C.R. 980 at 1005.

discarded. If the connection between the *Charter* violation and the evidence is found to be remote, it may be concluded that the exclusion of evidence is unavailable.[457]

The first case to set out the test for excluding evidence was *R. v. Collins*.[458] The analysis of s.24(2) began with a consideration of the words, "... would bring the administration of justice into disrepute." One possibility for interpreting this provision proposed was to ascertain the views of the community through opinion polls.[459] However, this approach was rejected in *Collins*. The Court's reasons included the dangers of leaving the determination of constitutional standards to an uninformed public, and a member of the public's lack of sympathy for an accused's rights until he himself becomes an accused.[460] The Court instead built upon a standard they were already well familiar with, "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully appraised of the circumstances of the case?". By dispassionate the Court meant unaffected by strong feelings in the community at the time of trial.[461]

To determine whether the administration of justice would be brought into disrepute in the eyes of the reasonable person, *Collins* sets out three sets of factors to be considered:

1) Factors involving the fairness of the accused's trial.

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457 *Ibid.* at 1005-1006.

458 *Supra* note 341.

459 Dale Gibson, *The Law of the Charter: General Principles* (Calgary: Carswell, 1986) at 236-246, cited in *Collins*, *supra* note 341 at 282.

460 *Supra* note 341 at 282.

461 *Ibid.*

2) Factors involving the seriousness of the *Charter* breach. A serious breach supports exclusion. A less serious breach may support admission of the evidence.

3) Disrepute brought to the administration of justice by the exclusion of evidence, potentially a mitigating factor against exclusion.[462]

Of the three sets of factors, the first set has by far assumed the greatest importance. The question of trial fairness involves a distinction between conscripted evidence, and non-conscripted evidence. If the accused was compelled or tricked into participating in the production of evidence against himself, the evidence is conscripted.[463] If real evidence (e.g., the handgun with the accused's fingerprints) was obtained by information conscripted from the accused in violation of his *Charter* rights, the real evidence will also be deemed conscripted.[464] There is an exception though. If the real evidence would (not could) have been found without the information conscripted from the accused, it will not affect the fairness of the trial.[465] If it is determined that admission of evidence would render the trial unfair, it will generally be excluded without consideration of the other two sets of factors.[466]

At the risk of generalization, it may be said that Aboriginal practices of justice emphasized hearing everything from anyone who had something to tell concerning a crime by a community member. An interesting example is the sentencing circle process developed by the Hollow Water healing team in Manitoba. While a prerequisite to the process is an

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462 *Ibid.* at 284-286.

463 *R. v. Stillman*, [1997] 1 S.C.R. 607 at 655.

464 *Ibid.* at 663-664.

465 *Ibid.* at 664-665.

466 *Ibid.* at 668.

admission of guilt, it is an illustrative example of an Aboriginal emphasis upon hearing it all from whomever there is to say it. The circle includes the offender, the victim, their respective families and support workers, investigating officers, as well as anyone in the community who wishes to participate. New Zealand has also established a mediation process based partially upon Maori traditions called the Family Group Conference. It is likewise very inclusive with regards to participation and "testimony."[467]

Not only is participation very inclusive, but Aboriginal conceptions of "relevancy" often have emphases that would go well beyond proof of *actus reus* and *mens rea*. Blue House and Zion, in reference to Navajo processes, state that of critical importance is exploring the underlying (and sometimes far reaching) reasons behind the misbehavior with a view towards restoring harmony in the community. The same is also true of the Family Group Conferences, the Hollow Water circles, and Iroquois processes.

Similarly, the Akwesasne Code makes it clear that anyone can present evidence before a convening of Justice Chiefs. In situations where an accused asserts his innocence, Article 6 - Section 5, reads:

> C. The accuser states the facts surrounding the offense, and presents all physical evidence to the Tribunal of Justices.
>
> D. Any and all other witnesses state the facts and present any physical evidence they have.
>
> F. The accused states the facts and present physical evidence on his behalf.
>
> G. The Accused may have witnesses state facts and present evidence on his behalf as well as witnesses who will attest to his character.

The very concept of excluding evidence pertinent to the criminal act itself as a means of protecting the individual against collective power would most certainly be alien to

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[467] Ross, *supra* note 387 at 19-23.

Aboriginal traditions, the Iroquois included. Aboriginal processes are inclusive enough to include the "input" or "testimony" of police officers, themselves subject to the terms of s.24(2). It becomes likely that there is a conflict between an Iroquois right to "hear everything" and an Iroquois accused's right to apply for exclusion of evidence.

On such a novel issue as this, assessing the preferred result is difficult guesswork. An educated guess can be made, based on two considerations. One is the place of the reasonable person standard within criminal law in general. The other is the special status which the court seems to attach to the right to a fair trial.

In *R. v. Hundal*, the Supreme Court decided that penal negligence was a constitutionally acceptable level of fault for criminal offences.[468] Penal negligence is not a subjective standard of fault. It does not base liability upon what the accused actually knew or intended. It is an objective standard of fault, based upon what the accused should have or should not have done.[469] In *Hundal*, the standard developed is whether the accused's conduct was a "marked departure" from how the reasonable person would have behaved in the same situation as the accused.[470]

In *R. v. Creighton*, the parameters of the reasonable person standard became a source of sharp division within the Court.[471] Chief Justice Lamer proposed an infusion of the accused's personal characteristics, such as education, intelligence, experience in the activity

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468 [1993] 1 S.C.R. 867 at 882.

469 *Ibid.* at 882-883.

470 *Ibid.* at 883-886, 889.

471 [1993] 3 S.C.R. 3.

engaged in, into the reasonable person test. In his words, "Human frailties can encompass personal characteristics habitually affecting an accused's awareness of the circumstances which create risk. Such characteristics must be relevant to the ability to perceive the particular risk."[472] In Chief Justice Lamer's analysis, greater education and experience could also mean holding the accused to a higher than usual standard of care.

Justice MacLachlin, speaking for the majority, rejected the Chief Justice's approach in favour of a uniform standard based upon the hypothetical reasonable person. In her words:

> I respectfully differ from the Chief Justice on the nature of the objective test used to determine the *mens rea* for crimes of negligence. In my view, the approach advocated by the Chief Justice personalizes the objective test to the point where it devolves into a subjective test, thus eroding the minimum standard of care which Parliament has laid down by the enactment of offences of manslaughter and penal negligence.[473]

She stated two major justifications in support of a uniform standard. One was that a uniform and minimum standard was necessary for the protection of the public. She quoted with approval this passage from the Ontario Court of Appeal:

> ... it would be unfair and , indeed, dangerous to the public to permit [teenagers] in the operation of the power-driven vehicles to observe any lesser standard than that required of all other drivers of such vehicles. The circumstances of contemporary life require a single standard of care with respect to such activities. Without a constant minimum standard, the duty imposed by the law would be eroded and the criminal sanction trivialized.[474]

Her second major justification was that a uniform standard was necessary to maintain certainty in the law:

> The explanations for why a person fails to advert to the risk inherent in the activity he or she is undertaking are legion. They range from simple absent-mindedness to attributes related to age, education and culture. To permit such a subjective assessment would be "co-extensive with the judgement of each individual, which would be as variable as the length of the foot of each individual" leaving "so vague a line as to afford no rule at all, the degree of judgement belonging to each

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472 *Ibid.* at 30.

473 *Ibid.* at 58.

474 *McErlean v. Sarel* (1987), 61 O.R. (2d) 396 at 413, cited in *ibid.* at 66-67.

individual being infinitely various".[475]

The only exceptions that could be made to the uniform standard were where a personal characteristic, in the circumstances involved, deprived the accused of the capacity to meet the minimum standard of care.[476] A classic example is the sudden onset of a medical condition while driving as described in *Hundal*. However, if an accused possesses foreknowledge of such characteristics, he is expected to behave responsibly and accordingly (not getting behind the wheel).[477]

It could be said that the concept of a reasonable person has one meaning in the context of penal negligence as a standard of fault, and another in the context of s. 24(2). What each meaning has in common though is that the standard of the reasonable person is to be a uniform standard. It is not to be varied according to the personal characteristics of each accused, or of each member of a community who is appraised of the circumstances of a case. Can the standard of the reasonable person be considered appropriate for traditional Aboriginal approaches to crime and justice? Consider the following quote from Kathy Brock:

> To the extent that section 24(2) in any way prevents or inhibits the straightforward prosecutions of mandated criminal law if it is reflexively and unthinkingly applied and evidence is excluded bringing the administration of justice into disrepute, this section has the potential to cause the delegitimation of criminal and weaken moral strictures.[478]

Section 24(2), so far as it concerns Aboriginal communities, could become especially problematic for the legitimacy of their justice systems. As previously mentioned, the whole

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475 *Creighton, supra* note 471 at 70.

476 *Ibid.* note 67.

477 *Hundal, supra.* note 468 at 887.

478 Kathy L. Brock, "Polishing the Halls of Justice: Sections 24(2) and 8 of the *Charter of Rights*" (1992/1993) 2 N.J.C.L. 265 at 270.

idea of excluding relevant evidence is alien to traditional processes. It could be fairly said that the exclusion of evidence would in the eyes of a reasonable Aboriginal person, at least one of traditional belief, invariably "bring the administration of justice into disrepute." A reason for this is that if evidence is excluded, it could lead to the accused not being subject to any process at all. In a system that emphasizes healing (victim, accused, and everyone else included) and restoration of community harmony, such a result would surely be hard to countenance.

A possible solution can be gleaned from the writings of Rupert Ross and David Cayley. Each suggests a partnership (Ross) or separation (Cayley) of adversarial and consensus-based processes.[479] Section 24(2) could continue to operate in a separate trial process, while remaining inapplicable in the restorative process. There remains a problem. In traditional times, Aboriginal justice tended to collapse "determination of guilt" and consensus-based processes together into the same process. This is true of the Akwesasne Code. The Code does allow an accused to plead guilty or not guilty. Yet even when the process goes to trial on a not guilty plea, Article 6, Section 5 reads in part:

> E. The Tribunal of Justices asks the accuser and witnesses in turn, what each thinks would be a just and equitable solution or end to the matter.
>
> H. The Tribunal of Justices ask the accused and each of his witnesses in turn what they think would be a just and equitable solution or end to the matter.

The imposition of s.24(2) upon such a process could be especially problematic.

The argument could be made that a search for alternatives could be made to accommodate an Aboriginal right to hear it all. The problem is that it involves making a

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[479] *Supra* note 387. Ross at 227-232, and Cayley at 325-327.

modification to the standard of the reasonable person. In *Creighton*, a Court majority made a concerted effort to maintain the uniformity of the standard, over and above the dissent of its own Chief Justice. The composition of the Court has changed somewhat since *Creighton*. Yet in *R. v. Morrisey*, the Court again stated the standard as a marked departure from that of a reasonable person.[480] It is safe to assume that the current Court remains insistent on the uniformity of the standard.

Suppose that the Court decides that an exception to the uniform standard is in order for the sake of accommodating Aboriginal justice systems? Does this signal to others to make their own challenges to the standard? Should an exception now be made for accuseds with learning disabilities? How about the visually impaired or hearing impaired? How about someone whose religious beliefs may have influenced his behavior in a crime of negligence? Where does one draw the line? The Court had gone through considerable effort to maintain the uniformity of the standard. It can be difficult to imagine them letting that door open again. This conclusion is strengthened by the Court's own pronouncements that setting a minimum standard of care is vital to the protection of society and their equation of the uniform standard with providing certainty to the law.

A counter argument can be made though. Carving an exception for Aboriginal justice initiatives can be justified on the basis that it merits protection as a constitutional right under s. 35(1). The line can then be drawn against the recognition of further exceptions which lack similar justification.

However, another reason the Court may prefer the application of s.24(2) is its own

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480 *R. v. Morrisey*, [2000] 2 S.C.R. 90 at 105.

treatment of s.24(2). Within the analytical grid of the *Collins* test, the exclusion of evidence is vital to preserving the fairness of an accused's trial. If an accused's trial is rendered unfair, the evidence will generally be excluded without reference to the other sets of factors. With reference to the conscripted vs. non-conscripted distinction in the *Collins* test, Steven Penney has this to say, "In the context of section 24(2) determinations, this newly formulated conception of the right to silence has become a kind of 'superright'"[481] By its own development of s.24(2) jurisprudence, the Court has convinced itself that excluding evidence is vital to preserving the fairness of trials. To impose s.24(2) on Aboriginal justice systems on this basis may seem like a circular mode of thinking, but it could occur should a conflict be found.

Dagenais would mandate striking a balance between the two sets of rights. Here it is especially problematic because the potential conflicts between s.24(2) and Aboriginal processes seem especially sharp. The trial is either fair or it is not. The evidence is either excluded or it is not. The remedy is available or it is not. The Court may be left in a situation where it has to say s.24(2) must remain in force at the expense of Aboriginal processes. How then can this be characterized as a balance? Does the Court have enough room to get its preferred result? Perhaps.

Under *Dagenais*, the deleterious effects of a fair trial would have to be weighed against the salutary effects of Aboriginal processes. The Hollow Water circles and the Family Group Conferences can be used as examples of remarkable statistical successes for

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[481] Steven M. Penney, "Unreal Distinctions: the Exclusion of Unfairly Obtained Evidence under s.24(2) of the Charter" (1994) 32 Alta. L. Rev. 782 at 797.

crime reduction and rehabilitation. Yet the fact remains that the Court, by its own jurisprudence, has elevated "fair trial" to a sort of super-right. Even within *Dagenais* itself, the freedom of expression was still circumscribed by reference to whether the accused's trial was kept fair. Jamie Cameron, with partial reference to *Dagenais*, had this to say, "Moreover, ... the Court held that the right to a fair trial must prevail when the competing interests cannot be accomplished."[482] With reference to *Dagenais*, Jennifer Koshan stated, "Despite the promise of the *Dagenais* case, a model of conflicting rights appears to be entrenched in the courts with the balance perpetually tipped in favour of the accused."[483] Despite the Court's disclaimer against a hierarchial approach, it is open to question whether the right to a fair trial is occupying the apex of the pyramid.

If an accused's trial becomes unfair by conscripted evidence, it seems inevitable that the Court will conclude that the deleterious effects outweigh whatever benefits there are to traditional processes. Section 24(2) must of necessity remain in force, at least in situations of conscripted evidence.

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482 Jamie Cameron, "Dialogue and Hierarchy in Charter Interpretation: a Comment on R. v. Mills" (2000) 38 Alta. L. Rev. 1051 at 1064.

483 Jennifer Koshan "Aboriginal Women, Justice and the Charter: Bridging the Divide?" (Nov 1998) 32 U.B.C.L. Rev. 23 at 51.

Chapter 6: Conclusions

To summarize, it is apparent that greater control over criminal justice is an aspiration for many Aboriginal peoples. A common thread among such aspirations is the desire to reshape criminal justice systems so that they reflect traditional Aboriginal ideals of justice. Practices of crime and justice based on Aboriginal traditions may be protected as constitutional rights under s.35 of the *Constitution Act, 1982*.[484] On the other hand, Aboriginal individuals may very well seek to enforce their legal rights protected under the *Charter of Rights and Freedoms*.[485] Clearly, these two sets of constitutional rights have the potential to come into considerable conflict. The focus of this thesis is to consider the ramifications that the *Charter* may present for systems based on traditional practices of justice. How may interpretations of *Charter* rights affect Aboriginal justice systems?

In attempting to answer this question, a methodology was constructed for deducing how the Supreme Court may attempt to resolve the conflicts between Aboriginal rights and legal rights. It is premised on an understanding that constitutional adjudication by the Court is result-oriented. Precedent is not necessarily a strict constraint on the Court in matters of constitutional interpretation. The Supreme Court will in the event of a conflict, decide according to what is for them a preferred result in a particular context or instance. Precedent is useful in this regard since it reveals which concepts have received sympathetic treatment from the Court in the past, and which have not.

This preferred result approach was first applied to the preliminary question of

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484 *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

485 *The Canadian Charter of Rights and Freedoms*, Part I of *ibid.*

whether the Court may be willing to recognize traditional practices of crime and justice as Aboriginal rights under s. 35(1). There is more than one potential scenario which may occur. One is that the Court will be unsympathetic towards greater Aboriginal control over criminal justice, and subject such claims to a rigorous application of the strict legal tests in *Van der Peet*.[486] This could mean a denial of Aboriginal claims to rights involving crime and justice. The second scenario could be recognition of such rights when they are proven by a preponderance of evidence, but they will be construed very narrowly. The third scenario is based upon an *obiter dictum* in *Delgamuukw*. It suggests that in the future, the Court may be willing to consider rights of Aboriginal self-government, and by inclusion Aboriginal rights to separate criminal justice systems, in more flexible terms.[487] Since a recognition of rights is possible under the second or third scenario, the rest of the thesis proceeds on the assumption that such rights are established and therefore protected under s.35(1).

The preferred result approach is next applied to ss. 25 and 32 of the *Constitution Act, 1982*. These two provisions, if interpreted a certain way, could prevent the *Charter* from having any application to Aboriginal practices involving crime and justice. Section 32 states that the *Charter* applies only to the federal and provincial governments of Canada. Since there is no explicit mention of Aboriginal governments in the text, it could be argued that it does not apply to Aboriginal criminal justice practices. However, the Court's preferred result may be that all within Canada enjoy the benefit and protection of *Charter* rights. As such, they may interpret s. 32 as drawing a conceptual distinction between government and private

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486 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1114-1115.

487 *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

actors so as to have the *Charter* apply to Aboriginal governments or justice systems. Section 25 states that *Charter* rights are not to be interpreted so as to abrogate or derogate from Aboriginal rights. Again, the Court may prove unwilling to allow Aboriginal governments or justice systems complete immunity from the *Charter*. They could use the purposive approach to *Charter* interpretation to say that part of the larger objects of the *Charter* is ensuring that everyone in Canada enjoys the benefit and protection of *Charter* rights. Therefore, the purposive approach mandates a different interpretation of s. 25 in the specific context of Aboriginal self-government. The *Charter* may still apply so that Aboriginal individuals still have the protection of *Charter* rights in relation to their governments or justice systems.

Chapter 5 involved a discussion of how the *Charter* may be applied to a separate system of justice, as envisioned by Mohawk traditionalists. An application of the preferred result approach suggests that the Court may make a genuine effort to balance the two sets of rights, as required by *Dagenais*. In practice, the Court may end up favouring legal rights for the most part. The Court has at times treated Aboriginal rights unsympathetically, to the point of frequently allowing non-constitutional rights to trump Aboriginal rights. On the other hand, certain legal rights are often difficult to justify infringements upon. Only those practices which can somehow be rationalized as acceptable within *Charter* terms may be accommodated under the *Dagenais* test.

Six specific examples were considered. Each example will be summarized below. In addition to the summaries, the thesis will where appropriate propose an alternative. The thesis has in mind the same objective as the Court may have, to balance Aboriginal rights and

legal rights. However, the disagreement this thesis has from what the Court may decide is that their decisions may still heavily favour legal rights over Aboriginal rights. The alternatives are proposed as suggestions of how Aboriginal rights could be better accommodated.

When it comes to search and seizure, the tests for whether an accused has a reasonable expectation of privacy may already provide a mechanism whereby Aboriginal perspectives could be accommodated. Additionally, the legal doctrines on s. 8 already provide considerable accommodation towards interests in conflict with s.8's privacy rights, such as crime prevention, and police investigations which obtain evidence of crimes. As such, the Court may prove hesitant to allow s.8's protections to be further eroded by claims to rights based on s. 35. The Court may decide that practices associated with modern day police forces such as investigations, and searches of private residences, have no basis in Aboriginal traditions and therefore do not merit protection under s.35. The doctrines on s. 8 would therefore remain as is. The writer is in substantial agreement with such an approach. The prevention of certain practices that could give rise to police states within Aboriginal communities is necessary. Since the law on s. 8 already makes considerable allowance for police investigations, coupled with the apparent lack of basis of modern-day police practices in Aboriginal traditions, there does not seem to be any need for change.

Judicial treatment of the presumption of innocence reflects a certain amount of deference towards legislative bodies in circumstances where such offences are designed to protect a vulnerable group in society, and in the area of regulatory offences. In such circumstances, the Court may also be willing to extend a similar leniency towards Aboriginal

systems. The Court may also prove willing to accommodate the procedures of the Akwesasne Code, which require a consensus amongst the Justice Chiefs in order to convict for a serious or grievous offence. The writer considers this to be a satisfactory balance, since it both safeguards against the conviction of an innocent person, and preserves an Aboriginal tradition. On the other hand, in the absence of any such safeguards the Court may decide that there is a vacuum that needs to be filled and require proof beyond a reasonable doubt. The writer would also be in agreement with this.

The preferred result approach suggests that the Court may be willing to accommodate Aboriginal non-adversarial processes to a point. Where there is a live issue going to guilt or innocence, such as circumstantial evidence cases or where identity of the perpetrator is open to dispute, the Court may well insist that the accused has a right to defend himself by adversarial means. The writer has no objection to such an approach. There is, however, a potential problem that may need to be addressed. Judicial lawmaking is often fraught with uncertainty, especially when it comes to broad concepts such as "the reasonable person." It seems likely that such uncertainty will riddle any efforts by the Court to delineate when consensus-based processes are appropriate, and when adversarial processes are appropriate. Aboriginal justice systems in the future could well find themselves bogged down in a mire of appeals on such an issue as this. A recommendation can then be made which is directed towards Aboriginal communities themselves. The recommendation is to create a separate trial process where an accused wishes to contest his guilt in earnest. It can still be understood that Aboriginal consensus-based processes will be used when it is apparent that a crime has been committed, but the reasons why remain to be understood, or where the

accused admits his guilt.

As previously mentioned, even where traditional processes are accommodated, the Court is likely to insist that such processes be held to natural justice. A potential problem arises when it comes to the requirement that the decision-maker not have a personal connection with a party to the dispute so that justice is seen to be done. Enforcing this requirement in the context of Aboriginal dispute resolution could prove especially problematic in small Aboriginal communities, where conceivably everybody knows everybody. In place of this requirement, it may well behoove the Court to use its imagination and search for alternative methods of ensuring fairness for an accused. One approach could be that in order for a hearing to be deemed valid, there must have been at least one person at the hearing who spoke favourably of the accused. This could avert the problem recognized by Joyce Dalmyn by ensuring that the judge has to hear something positive about the accused. Another approach could be to require a Justice Chief or Aboriginal judge to provide written reasons in any instance where he or she is personally connected to a party to the dispute other than the accused. The reason for this suggestion is that the written reasons provide the accused with a basis for appeal or judicial review of the decision. It can also place an onus on a Justice Chief or Aboriginal judge to ground his or her decision in the evidence itself.

On the question of the right to counsel, an application of the preferred results approach suggests that the Court may end up enforcing the right during the investigative stages of criminal process, and in circumstances where the accused may have the right to defend himself in adversarial fashion. The underlying reason for this may be that the right

to counsel is deemed necessary for the enforcement of other constitutional rights, such as the right to silence and the right to a fair trial. On the other hand, it has occasionally been suggested that the role of lawyer as advocate may be counterproductive to the goals of traditional processes. In circumstances where the Court may be willing to allow traditional processes as an alternative to adversarial processes, the Court may also be willing to condone an exclusion of lawyers as advocates from the process.

A suggestion can be recommended with reference to the right to counsel at the investigative stage. The suggestion is that "right to counsel" need not necessarily mean a licensed attorney or member of the bar. An Australian court developed this idea in *R. v. Anunga*.[488] In that case, the court articulated a number of guidelines for the interrogation of Aboriginal suspects, which have since become known as the Anunga rules. One of the guidelines is that an Aboriginal suspect should have a "prisoner's friend" with him during a police interrogation. The person would not necessarily be a lawyer, but someone in whom the suspect will have confidence and will feel supported by. This concept should perhaps be considered by Canadian judges and legislators. The prisoner's friend need not necessarily be an attorney, but perhaps possess knowledge of the traditional laws of the suspect's community, and some basic knowledge of legal rights under the *Charter*.

Recall that a traditional practice of the Iroquois was permanent banishment from the community where an individual lied four times. This thesis suggests that the Court will insist that there is still a right not to say anything to investigative authorities, and a right not to be compelled to testify at trial. If these rights are violated, remedy would be available

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[488] [1976] 11 A.L.R. 412 (N.T.S.C.)

through s. 24(1) or s. 24(2). If the accused lies during a statement given voluntarily to the police or during a formal proceeding, it may then be permissible to use banishment as a consequence for lying four times. What it amounts to is punishing someone who lies in circumstances analogous to perjury and obstruction of justice. Two suggestions may be made here. One is that the informational component required before interrogating an accused should be expanded. Investigative authorities could be required to inform an accused that he has the right not to say anything at all and also inform the accused of the consequence of banishment a fourth time after three warnings. The reason for this is that banishment may be especially severe within the context of Aboriginal communities. Every effort should then be made to put a suspect on notice of the potential consequences for lying. As for compelled testimony during a formal process, a suggestion could be based upon the creation of parallel systems, one for adversarial processes and one for non-adversarial processes, that was suggested earlier in this chapter. Compelled testimony could be allowed during consensus-based processes. The right to silence could remain in force during occasions where the accused elects to proceed with an adversarial defence.

An application of the preferred result approach to s. 24(2) suggests that the Court may want that section to remain in full force. This may prove undesirable for Aboriginal processes that traditionally have emphasized hearing everything from anyone who has something pertinent to say. One reason the Court may prefer to enforce s.24(2) is to preserve the uniformity of the reasonable person test. A counter argument is Aboriginal groups may merit a special exception since traditional procedures may be protected as constitutional rights under s.35. However, the Court, in its interpretation of s.24(2), may convince itself

that the exclusion of evidence is vital to preserving the fairness of criminal trials.

It is a contention of this thesis that linking together the exclusion of unconstitutionally obtained evidence and the fairness of a trial is misplaced. Most common law jurisdictions, excluding the United States, have until recently tended to include evidence obtained by questionable police methods so long as it was relevant to the case being heard. English common law, for example, would only allow exclusion of relevant though questionably obtained evidence in very exceptional circumstances. It was not until the 1950s that English authorities even began to consider the question of excluding such evidence. Though cases such as *Kuruma v. The Queen*[489] and *R. v. Sang*[490] created a new discretion to exclude confessions (not evidence obtained by searches) if they affected the fairness of a trial, it was apparent that the discretion would only be exercised in very exceptional circumstances.[491] Before the advent of the *Charter*, the Supreme Court of Canada explicitly rejected the idea that a trial judge may exclude relevant evidence on that basis that it may be unfair to the accused or that its admission would bring the administration of justice into disrepute.[492]

David Pacciocco questions, and denies, the idea that unconstitutionally obtained evidence affects the fairness of the trial. In his analysis, a compulsion to produce information in a setting such as a blood sample or a police line-up before trial is simply not

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489 [1955] A.C. 197. (P.C.)

490 [1980] A.C. 402 (H.L.)

491 Steven M. Penney, "Unreal Distinctions: the Exclusion of Unfairly Obtained Evidence under s.24(2) of the Charter" (Aug 1994) 32 Alberta L. Rev. 782 at 792-792.

492 *R. v. Wray*, [1971] S.C.R. 272.

the same thing as compelling the accused to take the stand at his own trial.[493] To prove his point, Paciocco asks that if evidence is not excluded because the police would inevitably have discovered it without the participation of the accused anyway, does the theory that unconstitutionally obtained evidence affects trial fairness still hold water? The evidence was after all still obtained in a manner that compelled the accused to produce it.[494] In his conclusion, he says that s. 24(2) is about enforcing the *Charter*, instilling respect for the *Charter*, but not the fairness of a trial.[495]

If s. 24(2) can be viewed in terms of the former, but not the latter, it is then feasible to search for alternatives to excluding evidence so as to better accommodate Aboriginal justice systems. In this regard, s. 24(1) can be suggested as an alternative source of remedy for an Aboriginal accused where evidence was obtained against him in the course of violating his rights. Likewise, the search for alternatives under s.24(1) can also be used to encourage (or force) Aboriginal police authorities to respect individual rights. Remedies available under s.24(1) can run nearly the whole spectrum so as to accommodate the circumstances of each individual case. For first or trivial instances, a verbal warning may be appropriate. For more serious or repeat instances, fines could be levied. For very serious instances or very repetitive occurrences, sanctions such as suspension, payment of damages (for example, the accused was also physically harmed), or even dismissal can be used.

A counter argument to this proposition is provided by Jack Watson. In his opinion,

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493 David M. Paciocco, "Evidence about Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof" (2000) 80 Can. Bar Rev. 433 at 452-453.

494 *Ibid.* at 453.

495 *Ibid.* at 453.

the use of the word "remedy" has a certain connotation in the context of s.24 as a whole. It is meant to be restorative to a person who has had his constitutional rights violated, and not turn into something which becomes randomly punitive of the public.[496] J.A.E. Pottow may in turn provide a counter to Watson's argument. Pottow's position is that s. 24(1) should be available to an accused as an alternative source of remedy where exclusion of evidence under s.24(2) may not be warranted.[497] He states one of his justifications for his position as follows, "As currently interpreted, exclusion is an all-or-nothing remedy, in two ways: first, it is the *only* remedy available in the evidentiary realm, and second, it is an *indivisible*, heavy-handed remedy that can easily overshoot the constitutional wrong."[498] Pottow's comment requires some qualification. Section 24(2) is not the only available constitutional remedy for excluding evidence. Under s. 11(d), the right to a fair trial and be presumed innocent, evidence which was **not** obtained in a manner that infringed the *Charter* can be excluded if it would render the trial unfair.[499] Under *R. v. White*, s. 24(1) provides a discretion to exclude evidence that would violate an accused's right to a fair trial.[500] Neither is the test for exclusion under s. 24(2) as heavy-handed and indivisible as Pottow suggests. In *R. v. Burlingham*, Justice Iacobuuci provided this caution against interpreting s. 24(2) too

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496 Jack Watson, "Curial Incompetence in Criminal Trials: a Discussion of Section 24 of the Charter of Rights and Freedoms in the Criminal Trial Context" (Part 1) (1990) 32 Crim. L.Q. 162 at 167.

497 J.A.E. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24" (Part 2) (2000) 44 Crim. L.Q. 34.

498 *Ibid.* at 67.

499 A judge has a discretion to exclude evidence of an accused's prior criminal history if its admission would render an accused's trial unfair. *R. v. Corbett*, [1998] 1 S.C.R. 670. In *R. v. Harrer*, [1995] 3 S.C.R. 562, the Court considered whether evidence obtained by an interrogation by non-Canadian officials conducted outside of Canada could still be excluded under s. 11(d).

500 [2000] 2 S.C.R. 417.

rigidly, "Thus, to the extent that this Court decides to set down such a rule in regard to 'trial fairness', I believe that it should take care not to define that concept so broadly as to allow the 'trial fairness' tail to wag the s.24(2) dog."[501] An example of where the Court did not exclude confessional evidence under s. 24(2) is found in *R. v. Harper*.[502] Both before and after the investigating police officers fulfilled the informational component of the right to counsel, the accused provided confessional statements with very little initiative on the part of the officers. The Court concluded that the accused would have confessed even if his right to counsel had not been violated. To admit the evidence would not have brought the administration of justice into disrepute.[503] Pottow's criticism that exclusion can produce effects out of proportion to the constitutional violation is valid nonetheless. If the evidence is classified as conscriptive, it is almost sure to follow that it will be excluded with considering the seriousness of the violation, or whether the exclusion of the evidence would bring the administration of justice into disrepute. That the exclusion of evidence can produce effects out of proportion to the constitutional wrong it is meant to redress is probably even more acute in the context of Aboriginal restorative justice. It therefore seems more appropriate to use s. 24(1) as the basis for remedy where traditional Aboriginal processes are concerned.

Another counter-argument is based on s. 24(2) jurisprudence. In *Burlingham*, the

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501 [1995] 2 S.C.R. 206 at 263.

502 [1994] 3 S.C.R. 343.

503 *Ibid.* at 353-354.

Court stated explicitly that s. 24(2) is not to be used as a source of police discipline.[504] This writer submits that this reasoning should not be a real impediment to using s. 24(1) for a number of reasons. One is that on a practical level, s. 24(2) is all about obliging authorities to conform to the *Charter*. The police must perform certain obligations when they have detained an accused, or else evidence that they obtain will be excluded. Another is that there is recognition that s. 24(1) can be used as a penalty and a civil remedy in instances of state malfeasance. In *Mackin v. NewBrunswwick (Minister of Finance)*, Justice Gonthier stated: "In theory, a plaintiff could seek compensatory and punitive damages by way of 'appropriate and just' remedy under s. 24(1) of the *Charter*."[505] In *R. v. 974649 Ontario Inc.*, the Supreme Court upheld an appellate court's decision that a Justice of the Peace had jurisdiction under s.24(1) to award legal costs against the Crown for violating the right to disclosure.[506] Another reason is that the exclusion of evidence could have drastic consequences for Aboriginal consensus-based processes such that it could hardly be deemed a balance under the *Dagenais* test. What is proposed is that s. 24(1) provides an alternative source of remedies so that Aboriginal perspectives on justice are accommodated, while still obliging investigative authorities to respect *Charter* values.

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504 *Supra* note 501 at 270.

505 [2002] S.C.J. no. 13 at para. 79. See also *R. v. Mills*, [1986] 1 S.C.R. 863.

506 [2001] 3 S.C.R. 575.

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The Code of Offenses and Procedures of Justice for the Mohawk Nation at Akwesasne

(Draft # 10)

The Code of Offenses and Procedures of Justice for the Mohawk Nation at Akwesasne

Article 1. Offenses Against One Another

CAPITAL
Murder
Rape
Kidnap
Assault (permanent)
Sale of Drugs
Prostitution (Child)

MINOR
Trespass
Prostitution (adult)
Disorderly Behavior

GRIEVOUS
Assault (less than perm.)
Custodial Interference
Theft
Stolen
Property
Malicious Damage
Bearing False Witness
Trespass

Article 2. Offenses Against the Community

CAPITAL
Abuse of Border Rights
Embezzlement of Public
Sale of Illegal Products
Operating Games of Chance
Disregard for Authority
Vehicle and Traffic
Uncontrolled Pets & Anim.

GRIEVOUS
Misrepresentation
Vehicle and Traffic
Uncontrolled Pets & Anim.

MINOR
Disorderly Conduct
Public Intoxication
Vehicle and Traffic
Uncontrolled Pets

Article 3. Offenses Against Nature

CAPITAL
Unnecessary Slaughter of Game Animals and Fish
Unnecessary Damage to Plant Life
Pollution

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01. Capital Offenses
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1. Ratification and Enactment of the Code of Offenses and Procedures of Justice
2. Amendability of Codes
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Article 8. Definitions of terms Used in this Act

1. Definition of Terms

Preamble

We, the people of the Mohawk Nation at Akwesasne having become aware of the need for the implementation of a code dealing with offenses committed against one another, against the community as a whole, and against the natural world, and for putting into place those procedures to handle these matters, have now come together to set such a code into effect, to create a goal for the common good of all the people, not only now, but also for generations to come.

For these reasons, we have now come together to set down these rules in writing, which shall be called **"The Code Of Offenses And Procedure Of Justice"**, to firmly establish a written set of rules to live by, now and in the future for the Mohawk people of Akwesasne.

Article 1. Offenses Against one Another

SECTION 1. Murder

A. It is unlawful for any person to intentionally cause the death of another for any reason whatsoever.

1. A violation of this section is a serious offense.

SECTION 2. Rape and Sexual Abuse

A. It is unlawful for any person to forcibly fornicate with or sexually abuse another. It is unlawful for any person to fornicate with a child.

1. A violation of this section is a serious offense.

SECTION 3. Kidnap

A. It is unlawful for any person to take or hold another person against that person's will.

1. A violation of this section is a serious offense.

SECTION 4. Assault

A. It is unlawful for any person to strike, or otherwise cause physical harm to another person .

1. When the act results in permanent damage it is a serious offense.

B. It is unlawful for any person to continually, as a course of conduct, threaten, verbally abuse, push, or jostle another.

1. A violation of this section is a grievous offense.

SECTION 5. Sale of Illegal Products

A. It is unlawful for any person to sell or to give any other person any alcohol, alcoholic beverages, or any drugs not legally prescribed by a physician or recognized healer, or any other illegal products.

1. A violation of this section is a serious offense.

SECTION 6. Prostitution

A. It is unlawful for any person to sell the services of a child to another person for sexual purposes.

1. A violation of this section is a serious offense.

B. It is unlawful for any person to sell another unconsenting adult to another person for sexual purposes.

1. A violation of this section is a minor offense.

SECTION 7. Custodial Interference

A. It is unlawful for any person to take possession of a child against the will of the parent or legal guardian or custodian of such child.

1. A violation of this section is a grievous offense.

SECTION 8. Abandonment and Neglect

A. It is unlawful for any person to abandon or neglect one's responsibilities to any other person where some famial or other responsibility lies.

1. A violation of this section is a serious offense.

SECTION 9. Theft

A. It is unlawful for any person to take any other person(s) goods or property by use of robbery, burglary, or any fraudulent or otherwise unlawful means.

1. A violation of this section is a grievous offense.

SECTION 10. Stolen Property

A. It is unlawful for any person to knowingly possess stolen property.

1. A violation of this section is a grievous offense.

B. It is unlawful for any person to knowingly sell stolen property.

1. A violation of this section is a grievous offense.

SECTION 11. Malicious Damage

A. It is unlawful for any person to maliciously damage the property of another by breaking, cutting, crushing, burning or any other means.

1. A violation of this section is a grievous offense.

SECTION 12. Bearing False Witness

A. It is unlawful for any person to make a false statement against another.

1. A violation of this section is a grievous offense.

B. It is unlawful for any person make a false statement to benefit oneself or another.

1. A violation of this section is considered a grievous offense.

SECTION 13. Trespass

A. It is unlawful for any person, except for anyone who has a lawful or legitimate reason for being on that property, to enter into any other's home or on any other's property without permission or invitation of the other.

1. A violation of this section in regards to a person's home is considered a grievous offense.

2. A violation of this section in regards to property, other than a person's home, is a minor offense.

SECTION 14. Disorderly Behavior

A. It is unlawful for any person to shove, push, jostle, obstruct or impede, threaten or speak vile offensive or abusive language to another.

1. A violation of this section is a minor offense.

Article 2. Offenses Against the Community

SECTION 1. Abuse of Border Rights

A. It is unlawful for any person to abuse the collective aboriginal rights of free border crossing for the sale of, or transporting of, any alien person, liquor, drugs, stolen goods, weapons or any items not sanctioned by the Mohawk Council of Akwesasne, Mohawk Council of Chiefs or St. Regis Tribal Council.

1. A violation of this section is a serious offense.

SECTION 2. Embezzlement of Public Funds or Property

A. It is unlawful for any public official or any other person to take, or withhold, or use illegally, any public funds or public property for his own gain or for the unlawful gain of another.

1. A violation of this section is a serious offense.

SECTION 3. Sale of Illegal Products

A. It is unlawful for any person or group of persons to open their home, building, or property for the manufacture, use or sale of, or the promotion of the sale of, alcohol, alcoholic beverages, drugs not legally prescribed by a physician or recognized healer, or any other unlawful products.

1. A violation of this section is a serious offense.

SECTION 4. Operating Games of Chance

A. It is unlawful for any person or group of persons to open their home, building, or property to operate any unlicensed game of chance.

1. A violation of this section is a serious offense.

SECTION 5. Disregard for Authority

A. It is unlawful to disobey the directions of a person of authority.

1. A violation of this section is a serious offense.

SECTION 6. Misrepresentation

A. It is unlawful for any person or organization to misrepresent themselves, their goods, products or services to others.

1. A violation of this section is a serious offense.

SECTION 7. Disorderly Conduct

A. It is unlawful for any person in a public place to make loud disturbing noises, yell in a loud voice, speak vile, offensive or abusive language, threaten, harass, provoke, or otherwise disturb the peace of the community.

1. A violation of this section is a minor offense.

SECTION 8. Public Intoxication

A. It is unlawful for any person to be, or appear in any public place while in an intoxicated condition, or while under the influence of any drug which has not been prescribed by a physician or recognized healer.

1. A violation of this section is a minor offense.

SECTION 9. Uncontrolled Pets and Domesticated Animals

A. It is unlawful for any owner of any pet or domesticated animal to allow such pet or, domesticated animal to cause harm to any individual, personal, or public property, or wildlife.

1. A violation of this section is, when deemed by a member of the Justice Tribunal, either a minor, grievous or serious offense.

Article 3. Offenses Against Nature

SECTION 1. Unnecessary Slaughter of Animals, Birds and Fish

A. It is unlawful for any person to kill any animal, bird or fish except for those persons in need of food, and except for those licensed for commercial purposes.

1. A violation of this section is a serious offense.

SECTION 2. Unnecessary Damage to Plant Life

A. It is unlawful for any person to destroy any plant life except for those plants to be used by this person, his immediate family, for those in need, and except for those licensed for commercial purposes.

1. A violation of this section is a serious offense.

SECTION 3. Pollution

A. It is unlawful for any person to discard or discharge any materials which would have the effect of polluting land, air, water, weed beds, marshes, watertable, or waterways.

1. A violation of this section is a serious offense.

SECTION 4. Altering Nature

A. It is unlawful for any person or group of persons to change or alter any terrain or water course which would be detrimental to natural life cycles, or which would have an adverse effect on nature.

1. A violation of this section is a serious offense.

SECTION 5. Abuse and Neglect of Animals, Birds and Fish

A. It is unlawful for any person to abuse any animal, bird or fish, or neglect any animal, bird or fish that is in the care of an individual.

1. A violation of this section is a grievous offense.

Article 4. Vehicle and Traffic Offenses

A. The regulations enacted by the Mohawk Council of Akwesasne will be inserted here.

Article 5. Attempt, Conspiracy, Defense.

SECTION 1. An Attempt At An Offense

A. An attempt at an offense is unlawful in itself and equivalent to in severity to the offense attempted.

SECTION 2. Conspiracy

A. Any conspiracy to commit an offense is a separate offense.

1. A violation of this section is equivalent in severity to the offense conspired on.

SECTION 3. Implanting An Idea

A. Implanting an idea or ordering a person to commit an offense is unlawful.

1. A violation is equivalent in severity to the offense suggested to or ordered to another person to carry out.

SECTION 4. Law Enforcement Duty

A. A law enforcement person is not to use excessive force in the execution of his duty.

1. A violation is a serious offense.

SECTION 5. Defense

A. Self defense, defense of another, sincere belief in the state of facts which if they were true would make the act lawful are all considered defenses to an offense.

Article 6. Procedure of Justice

SECTION 1. Procedure of Justice

A. A serious offense is heard by the Tribunal of Justice Chiefs.

B. Any conviction of a serious offense shall be punishable by a sentence up to and including banishment.

C. A conviction of a serious offense is only be found when all Justices on the Tribunal reach a consensus.

D. Any sentence pronounced by the Tribunal of Justices is reached by consensus.

E. If the sentence is banishment, the offender may be held to be turned over to the authorities of New York State, the provinces of Quebec or Ontario, or to the federal authorities in the United States or Canada depending on the geographical location of the offense.

SECTION 2. Grievous Offenses

A. A grievous offense is heard by a tribunal of Justice Chiefs.

B. Any conviction of a grievous offense is punishable by a sentence up to, but not including, banishment.

C. A conviction of a grievous offense is found only when all Justices on the Tribunal reach a consensus.

D. Any sentence pronounced by the Tribunal of Justices is reached by consensus.

SECTION 3. Minor Offenses

A. A minor offense is heard by two Justice Chiefs. It shall be the duty of the Justice to attempt to mediate the matter until a settlement is reached. If a settlement cannot be reached after all parties are heard, the Justices will reach a consensus and then pronounce the findings.

SECTION 4. Bringing An Action Before the Justices

A. Any person against whom an offense was committed, or who has witnessed any offense enumerated in the first five articles of this code, may in writing, or orally state, to any one of the Justices, the offense committed and name the offender(s) including such information as the time, place and other particulars surrounding the offense.

1. When the statement of accusation is made orally, it is the duty of the Justice Chief to put the statement in writing.

B. Once the Justice has the written statement of accusation, he convenes a meeting of the Justices. If there is a consensus that an offense may have been committed, the Justices summon the accused to appear before the Tribunal of Justices in any matters involving serious or grievous offenses, or two of the three Justices in any matter involving a minor offense.

C. The summons is in writing and served personally upon the person charged with the offense.

1. The summons states where the accused is to appear, on a specific date and at a specific time.

2. The summons states the offense charged, and must be accompanied by a copy of the written accusation.

3. The summons is served by any adult person who has been so designated by the Tribunal of Justices.

4. The failure to respond to the summons causes the accused to be tried in absentia and if found guilty, the maximum penalty may be imposed.

D. A copy of the summons is provided to the person bringing the complaint at the time of notification to the accused.

SECTION 5. The Trial of a Serious or Grievous Offense

A. The Tribunal of Justices convene the trial of an offense by first stating the offense charged by reading the accusation, as they have it before them notifying all in attendance.

B. The Tribunal of Justices thereby ask the accused if he is guilty or not guilty of the offense.

1. Should the accused plead guilty, the Tribunal of Justices ask the accuser and any other aggrieved parties what each thinks would be a just and equitable end to the matter before them.

2. The Tribunal of Justices ask the offender and any other person(s) the offender wishes to bring forth, what he then thinks would be a just and equitable end to the matter.

3. Should the accused plead not guilty, the trial shall proceed as follows.

C. The accuser states the facts surrounding the offense, and presents all physical evidence to the Tribunal of Justices.

D. Any and all other witnesses state the facts and present any physical evidence they have.

E. The Tribunal of Justices asks the accuser and witnesses in turn, what each thinks would be a just and equitable solution or end to the matter.

F. The accused states the facts and present physical evidence on his behalf.

G. The Accused may have witnesses state facts and present evidence on his behalf as well as witnesses who will attest to his character.

H. The Tribunal of Justices ask the accused and each of his witnesses in turn what they think would be a just and equitable solution or end to the matter.

I. The Tribunal of Justices deliberate and make their findings by declaring the accused either guilty or not guilty, and in the event of a finding of guilty, pronounce sentence.

SECTION 6. The Trial of a Minor Offense

A. In the matter of a minor offense, the two Justices hearing the matter follow the same procedure as in Section 5 of this article.

SECTION 7. Sentences

A. Sentences pronounced by a Tribunal of Justices upon a finding of or a plea of guilty to a capital offense include:

1. Monetary fine not to exceed $500,000.

2. Penalty of twice the amount of profit made from the illegal activity.

3. Restitution.

4. Probation not to exceed five years.

5. A sentence of community service not to exceed a period of five years.

6. Destruction of a dangerous animal.

7. Banishment (which includes mandatory holding over for authorities enumerated in Section 1 of this article).

8. A combination of any of the above.

B. Sentences pronounced by a Tribunal of Justices upon finding of or a plea of guilty to a grievous offense include:

1. Monetary fine not to exceed $1,000.

2. Penalty twice the amount of profit made from illegal activity.

3. Restitution.

4. Probation not to exceed three years.

5. A sentence of community service not to exceed a period of three years.

6. Permissive holding over for authorities enumerated in Section 1 of this article.

7. A combination of any of the above.

C. Sentences pronounced by two Justices upon a finding or a plea of guilty for a minor offense include:

1. Monetary fine not to exceed $500.00.

2. Penalty twice the amount of profit made from illegal activity.

3. Restitution.

4. Probation not to exceed one year.

5. A sentence of community service not to exceed one year.

6. A combination of any of the above.

SECTION 8. Appeals

A. How an appeal is commenced for serious or grievous offenses.

1. Within thirty days of a finding and sentencing by the Tribunal of Justices, or anytime after the finding of any new evidence concerning the matter, any party to the proceeding may appeal the finding or sentence or both, to the Grand Tribunal of Justice Chiefs, by filing a written notice of the appeal with the Tribunal of Justices, and in the written notice, state the grounds for such appeal.

2. Within fifteen days of the filing of the notice of appeal, the Tribunal of Justices file their return, along with the appellants notice of appeal, with the Grand Tribunal of Justices. The return includes the record of the proceeding which was held before them.

B. The Grand Tribunal of Justices deliberates on the appeal before them and they may ask for oral statements to be made by the parties involved.

C. After due deliberation, the Grand Tribunal of Justices may:

1. Overturn the finding of the Tribunal of Justices, or the sentence, or both, and may:

a. Return the matter to be re-heard by the Tribunal of Justices.

b. Dismiss the matter in its entirety.

2. Uphold the finding of the Tribunal of Justices.

D. An appeal of a minor offense occurs in the same manner as in Subsection A of this section but the appeal is taken before the Tribunal of Justices, and the Tribunal proceeds in the same manner as the Grand Tribunal of Justices did in subsections B and C of this section.

1. Any appeal matter brought before the Tribunal under this subsection is heard by a Tribunal of three of the remaining four Justices and/or associate Justices.

2. In the event of an appeal Tribunal not being able to be convened due to an incapacity to hear the appeal, the appeal is sent directly to the Grand Tribunal for first determination.

SECTION 9. Composition, Selection and Duties of the Tribunal of Justices

A. The Tribunal consists of three Justices, who convene from time to time to hear matters brought before them pursuant to the provisions of articles one through five of this code. The three Justices are recognized members of the Mohawk Community at Akwesasne and are

chosen jointly and appointed by consensus of the Mohawk Nation Council of Chiefs, St. Regis Mohawk Tribal Council, and the Mohawk Council of Akwesasne. The appointment is for 15 years.

1. Vacancies occurring prior to the expiration of a term are filled by consensus of the Mohawk Nation Council of Chiefs, the St. Regis Mohawk Tribal Council, and the Mohawk Council of Akwesasne within 60 days of the occurrence of the vacancy. Any new appointment is for 15 years from the date of the appointment

B. There are three Associate Justices selected in the same manner as prescribed in subsection A of this section. An Associate Justice Chief takes the place of any Justice only in the absence, incapacity, or unavailability of a Justice Chief or when called upon to hear an appeal on a minor offense.

C. The Justices are selected on the basis of their own exemplary behavior; impartiality, their ability to be mindful of the code, the moral fibre and needs of the community; as well as having compassion for both the accused and victims of the offenses committed.

D. It is the duty of the Justices to hear, try and determine all matters which are brought before them in a fair, equitable and impartial manner, with an eye toward mediation and conciliation of such matters, and where conciliation cannot be reached, to exonerate, or determine the guilt of the accused, and where guilt is found, to determine the punishment of the guilty party.

It is the duty of the Tribunal of Justices to accept and receive any and all appeals of their decision and proceed with such appeal as prescribed in Section Eight of this Article.

E. In minor offenses to be heard by two Justices, the Justices to hear such matters are selected from among themselves or from their associates, and are appointed on a case by case basis by the three Justices.

SECTION 10. Composition, Selection and Duties of the Grand Tribunal of Justices

A. The Grand Tribunal of Justices convenes from time to time to hear matters brought before them pursuant to the provisions of this article concerning appeals. The Grand Tribunal is composed of three (3) Grand Justices selected by the Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council. Each of the three (3) councils mentioned above jointly deliberate and come to a consensus as to the appointment of the Grand Justices. The Grand Justices are appointed for life.

1. Vacancies occurring prior to the expiration of term are filled by concensus by the Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council within (60) sixty days of the occurring vacancy.

B. Grand Tribunal of Justices appointees are selected on the basis of their own exemplary behavior; impartiality; their ability to be mindful of the Code of Offenses and Procedures of Justice, the moral fibre and needs of the community; as well as having compassion for both the accused and victims of the offense committed.

C. It is the duty of the Grand Tribunal of Justices to hear and determine all appeals which are brought before them by the Tribunal of Justices in a fair, equitable and impartial manner, with an eye toward mediation and conciliation of such appeals. The Grand Tribunal of Justices may dismiss, modify or uphold the findings of the Tribunal of Justices. The decision set forth by the Grand Tribunal of Justices is final.

SECTION 11. Selection and Duties of the Justice Clerk.

A. A clerk to the Tribunal and Grand tribunal is appointed by the Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council. Each of the

three (3) councils mentioned above jointly deliberate and come to a concensus as to the appointment of the Justice Clerk. The term of appointment is at the discretion of the three councils.

B. Duties of the Justice Clerk are: recordkeeping, filing, file maintenance, copying reports and submitting reports to proper authorities or agencies.

C. The Justice Clerk submits a "monthly report of closed case activity" showing the types of matters which were held by the Justices, including any of the sentences which were imposed and any of the monies received in the form of fines and/or fees.

D. The Justice Clerk places the fines or fees collected into the official bank account of the Justice System within 72 hours for any fines or fees which are collected.

1. Monies are expended for the operation and maintenance of the Justice system.

SECTION 12. Composition, Selection and Duties of the Mohawk Justice Conduct Society

A. The Mohawk Justice Conduct Society convenes from time to time to hear matters of misconduct on the part of the Justices pursuant to section 13 of this article.

B. The Mohawk Justice Conduct Society will have three (3) members appointed by the Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council with the councils jointly deliberating and coming to a consensus as to the appointment of the Mohawk Justice Conduct Society members. The appointment is for nine (9) years.

C. Mohawk Justice Conduct Society members are selected on the basis of their own exemplary behavior and impartiality.

SECTION 13. Removal of Justices

A. Failure to uphold the responsibilities set upon a Justice Chief, or unexemplary behavior of a Justice may result in the removal of the Justice prior to the expiration of the term.

B. Any person observing a Justice violating the responsibilities or behaving in an unexemplary manner may bring a Request for Removal in writing, or orally to any member of Mohawk Justice Conduct Society within 30 days of the occurrence of the alleged violation. The Request for Removal states the violation observed, the name of the alleged violator, and any information as to the time, place and other particulars surrounding the alleged violation.

1. When the request is made orally, it is the duty of the Mohawk Justice Conduct Society to acknowledge the request in writing.

C. The member taking the Request for Removal promptly convenes a meeting of the Mohawk Justice Conduct Society to discuss the Request of Removal. If there is a consensus a violation may have occurred the Mohawk Justice Conduct Society shall:

1. Summon in writing the alleged violator and person(s) making the accusation to appear before them at a specific date and time.

2. Present to the alleged violator the facts in the case in writing prior to the appearance before the society.

3. If the alleged violator fails to appear at the appointed time and place the matter may be discussed in the absence of the alleged violator.

4. The case is heard and final determination made within 30 days from the receipt of the Request for Removal.

D. If there is a determination a violation has occurred, the Mohawk Justice Conduct Society shall:

1. Notify all parties and councils of the determinations and actions.

2. Warns the Justice future violations may lead to removal or,

3. Removes the Justice.

E. If there is determination no violation occurred, the Mohawk Justice Conduct Society notifies all parties in writing and sends a notice of findings to the Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council. Included in this notice is all information, deliberations and final determination on the matter.

F. Any decisions made by the Justice Conduct Society is binding.

Article 7. Ratification, Enactment and Amendability of The Code of Offenses and Procedures of Justice and the Scope of Authority of the Tribunal of Justice Chiefs and the Grand Tribunal of Justice Chiefs

SECTION 1. Ratification and Enactment of the Code of Offenses and Procedures of Justice

A. The Code of Offenses and Procedures of Justice shall be presented to the public for hearings by the respective councils. After the hearings are held the Mohawk Nation of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council shall meet to deliberate the findings and within sixty (60) days come to an agreement on whether or not to adopt the Code of Offenses and Procedures of Justice.

B. If adopted the Code of Offenses and Procedure of Justice becomes effective on the 1st day of the 4th month after the date of adoption.

C. All existing codes and regulations in effect anywhere within the boundaries of the Mohawk Territory at Akwesasne at the time of the Code of Offenses and Procedure of Justice is adopted falls within the authority and is bound by the Code of Offenses and Procedures of Justice provided all three (3) councils are in agreement. If all 3 councils do not agree, the existing codes and/or proposed codes and regulations are not to be incorporated into the Code of Offenses and Procedure of Justice for the Mohawks Territory of Akwesasne and will become null and void.

D. The Code of Offenses and Procedures of Justice is enacted with the intent of strengthening the Mohawk Community within the Mohawk Territory at Akwesasne and affirming the determination of the Mohawk Community to be one nation protected by one set of codes and procedures applicable to all regardless of geographical location. It is also affirming the determination of the Mohawk people to be governed by Mohawks rather than foreign governments.

SECTION 2. Amendability of the Code of Offenses and Procedures of Justice

A. The Code of Offenses and Procedure of Justice is an enduring document. From time to time it may be necessary to add new sections, modify existing sections or delete inappropriate sections as conditions change within the Mohawk Community. This may be done by:

1. One of the councils bringing a proposal before the collective group of Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council.

2. Individuals bringing a proposal to one of the councils for possible presentation to the collec-

tive group of Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council.

B. The Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and St. Regis Mohawk Tribal Council after deliberating the proposed change to the Code of Offenses and Procedures of Justice may decide a change is needed and draft such a change to present at a public hearing as set forth in Section 1 of this article.

SECTION 3. Scope of Authority of the Tribunal and Grand Tribunal of Justices

A. All decisions rendered by the Tribunal of Justices and Grand Tribunal of Justices is binding upon all people of the Mohawk Nation at Akwesasne, all people outside the Mohawk Community at Akwesasne who are parties named in any action set forth by the Tribunal of Justices or Grand Tribunal of Justices, and all current and future chiefs of the Mohawk Nation Council of Chiefs, Mohawk Council of Akwesasne, and the Saint Regis Mohawk Tribal Council.

Article 8. Definitions of Terms Used in This Act

Akwesasne: The past traditional territories of the Mohawks through allodial title, present territories owned by the Mohawks, and future territories beyond what the Mohawks owned in the past which include all lands, waters, areas, beneath the surfaces, weed beds, marshes, soils, minerals, gases, aquifers, and air as recognized by the Mohawk Community at Akwesasne.

Assault: unlawful intentional infliction, or attempted or threatened infliction, of injury upon another person.

Attempt:: intentional performance of an act without completion of it.

Authority: a person vested with the power to act for the Mohawk Territory at Akwesasne or foreign governments as stated in this code.

Banishment: restricted from entering the Mohawk Territory at Akwesasne and/or loss of Mohawk privileges and benefits as granted by treaties and law and through custom.

Benefit:: any gain or advantage to the beneficiary including any gain or advantage to a third person beneficiary.

Border: see free border crossing.

Building: a structure, vehicle, or watercraft used for lodging of persons, or used by persons for carrying on business therein, or used as a school.

Burglary: trespassory breaking and entering of the dwelling of another (fixed structure, vehicle, vessel used for residence, industry or business) with the intent to commit a crime.

Child: any person who has yet reached the age of 18 years, or any person who has been declared or recognized as mentally deficient or incapacitated.

Collective Aboriginal Rights: original rights of a people or a Nation by virtue of their occupation on certain lands from time immemorial.

Consensus: collective agreement.

Conspire: two or more persons agree to commit an unlawful act, or to use unlawful means to accomplish an act.

Custodial interference: interfering with the duties and responsibilities of the person entrusted with the care and safekeeping of a child.

Devious Means: an act intended to lure a person by misleading or misrepresentation, and/or act by which is not morally acceptable.

Disorderly Behavior: unlawful interruption of the peace, quiet, or order of a community.

Disorderly Conduct: consistent, repetitive, disorderly behavior.

Drugs: any substances recognized as drugs in the official United States Pharmacopeia, a Canadian equivalent or any supplement to any of them. Any substances taken by mouth; injected into a muscle, the skin, blood vessel, or a body cavity; inhaled; or applied topically, which are intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals. Any substances (other than food) intende to affect the structure or a function of the body of man or animal.

Embezzlement: misappropriation or misapplication of money or property entrusted to one's care, custody, or control.

Fine: penalty imposed upon a convicted person by the Justices, requiring that the offender pay a specified sum of money to the justice system.

Fornicate: sexual intercourse or attempted sexual intercourse with a person.

Fraudulent:: using false pretenses, deceit, or intentional misrepresentation of fact with the intent of unlawfully depriving a person, or institution of property or legal rights.

Free Border Crossing: inherent right of each individual to travel freely across international borders as set forth in treaties, agreements and memorandums of understanding between the Mohawk Nation at Akwesasne and foreign governments.

Game of Chance: wagering systems involving uncertain events.

Grand Tribunal of Justices: a body consisting of three Justices appointed by members of the Mohawk Nation Council of Chiefs, the St. Regis Mohawk Tribal Council, and Mohawk Council of Akwesasne to hear appellate cases.

In Absentia: while not being present.

Incapacitated: lacks physical or intellectual power or natural or legal qualifications.

Justices: Tribunal, Grand Tribunal, Associate Members.

Justice System: police, court, support groups/agencies.

Kidnap: to seize and hold a person by force or fraud.

Licensed: official permission granted by authority.

Malicious Damage: intentionally destroying or damaging, attempting to destroy or damage, the property of another without consent.

Mohawk Justice Conduct Society: a body to oversee misconduct charges brought against Justices consisting of three (3) appointed members selected by the Mohawk Nation Council of Chiefs, the St. Regis Mohawk Tribal Council, and the Mohawk Council of Akwesasne.

Mohawk Community: the people living within the Mohawk Territory of Akwesasne.

Mohawk Territory at Akwesasne: see Akwesasne.

Motor Vehicle: see vehicle.

Neglect: failure to perform or to do some work, duty, or act that can be done or is required to be done.

Offense: violation of the codes except where it is an act of self-defense.

Partial Loss: a loss of a part of a thing or its value, as compared with total loss.

Penalty: a punishment established by law or authority for a crime or offense.

Person: a human being.

Premises: a building and any real property.

Priviledge: a benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens.

Probation: conditional freedom granted by Justices to an adjudged person, as long as the person meets certain conditions of behavior.

Property: lawful ownership and possession and also the right of use and enjoyment for lawful purposes.

Public Intoxication: being in a public place while intoxicated through consumption of alcohol or other drugs.

Restitution: Justices requirement that a convicted person pay money or provide services to the victim of an offense.

Robbery: unlawful taking or attempting to take property that is in the immediate possession of another, by force or the threat of force.

Self Defense: protection of oneself or one's property from unlawful injury or the immediate risk of unlawful injury; the justification for an act which would otherwise constitute an offense.

Sexual Abuse: physical or emotional injury by improper, offensive or hamful acts.

Trespass: entering or remaining in or upon premises of another.

Tri-Council of Chiefs: the Mohawk Nation Council of Chiefs, the St. Regis Mohawk Tribal Council, and the Mohawk Council of Akwesasne.

Tribunal of Justices: a body consisting of three appointed Justices.
Vehicle: wagon, cart, car, truck, trailer, motorcycle, traction engine, snowmobile, road making machinery, all terrain vehicles, or other conveyance that is driven, propelled, or drawn by any kind of power, other than manpower.